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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 v.

15 Cr. 769 (AJN)

5 YURI LEBEDEV and TREVON GROSS,

6 Defendants.

Jury Trial

7 -----x
8 New York, N.Y.
9 March 3, 2017
9:10 a.m.

10 Before:

11 HON. ALISON J. NATHAN,

12 District Judge
13 And A Jury

14 APPEARANCES

15 PREET BHARARA

United States Attorney for the
Southern District of New York

16 BY: EUN YOUNG CHOI

17 DANIEL S. NOBLE

WON S. SHIN

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24 BY: KRISTEN M. SANTILLO

25 BY: HENRY E. KLINGEMAN

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(In open court; jury not present)

THE COURT: Good morning, everyone.

We'll do the charging conference. If we're not done by 10:00, we'll interrupt to deal, as we need to, with -- I believe things stand at two witnesses, two potential defense witnesses, who will be here to work through the representation and potential conflicts issues.

Any updates on that?

MS. SANTILLO: Yes, your Honor. We are not going to have any witnesses here, I just learned.

THE COURT: Okay. Then we can let the CJA lawyers know that they're not needed. They're not coming at all today?

MS. SANTILLO: No, they're not.

THE COURT: So none of the folks that this issue has implicated will be testifying?

MS. SANTILLO: That's correct, your Honor.

THE COURT: All right. Thank you for that update. We will relieve the CJA lawyers of appearing in court.

MS. CHOI: Your Honor, can I just ask -- I'm sorry -- just for clarity, was that both Mr. Larkins and Mrs. Larkins are not going to testify on behalf of Mr. Gross?

MS. SANTILLO: No, Mrs. Larkins will be testifying. I was informed by the government that she had no issues.

MS. CHOI: Well, your Honor, I think in an abundance of caution, I think that you had indicated that you thought

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1 that it may make sense for even Mrs. Larkins to have the
2 inquiry, because if I --

3 THE COURT: Well, let me just start with one basic
4 question. Is she represented by Mr. Ashley?

5 MS. CHOI: Yes, she is.

6 THE COURT: So, I think in my mind, it raises the
7 concern that was discussed on Wednesday as to whether there is
8 a conflict between Hope Cathedral, the entity that Mr. Ashley
9 represents --

10 MS. CHOI: Yes.

11 THE COURT: -- and this witness.

12 MS. CHOI: And for clarity, your Honor, this witness
13 is the director of finances at the church, so it does raise
14 particular concerns. We'd just also note, she's the one who --
15 it's our understanding she's the one who answered a trial
16 subpoena that we had regarding the finances of the church.
17 Defense counsel has represented she is the one who would know
18 the most about it, so she is differently situated than most, I
19 think, board members, who may be members of the church or may
20 attend the church from time to time. What she does at the
21 church is inextricably intertwined with the finances, which is
22 the real crux of the conflict at issue.

23 THE COURT: I think the question, then, is whether --
24 Ms. Santillo, I think this still implicates the conflict issue,
25 at least as we discussed when we were last here.

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1 MS. SANTILLO: Your Honor, I had specifically asked
2 which witnesses we thought were problematic, and I
3 understand --

4 THE COURT: Well, just a moment. Just a moment.
5 Let's use precision. I think it's important. What I had
6 understood was who had some potential criminal liability. I
7 don't understand -- I think the government did say that they
8 had no reason to think that Ms. Larkins faces any potential
9 criminal liability. Correct?

10 MS. CHOI: Sorry?

11 THE COURT: You had made that representation here?

12 MS. CHOI: With regard to the charged conduct, yes.
13 Obviously -- she wasn't on the board with regard to HOPE FCU,
14 so it's not our understanding that she was involved in the
15 misrepresentations to the NCUA and the like.

16 We would caveat -- because we have been thinking
17 through these issues as they evolve -- your Honor, the
18 government will be putting in its case in chief evidence of the
19 taxes that Mr. Gross had paid or not paid in this matter. It's
20 our understanding Ms. Larkins is involved in, for example,
21 making sure that W-2s are issued, making sure that they are
22 reporting the salary that is due to Mr. Gross. I don't know,
23 sitting here today, whether or not she is aware of these facts,
24 about whether or not -- whether or not she is aware of certain
25 other money that Mr. Gross paid himself out of the coffers of

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1 the church, and whether or not she's aware of precisely how
2 that gets reported to the IRS, but our understanding is that
3 she is involved. And so as we're thinking about this, that is
4 one thing that we're just not sure about, but with regard to
5 the charged conduct in the case, we don't have any reason to
6 believe that she is implicated.

7 THE COURT: So I think the question remains, based on
8 the issue raised last we were here, as to whether Mr. Ashley's
9 representation of Hope Cathedral and the potential
10 implications, financial and otherwise, to Hope Cathedral, if
11 Mr. Gross is convicted, raises a conflict question with respect
12 to Mr. Ashley's representation of that witness for purposes of
13 testimony at his trial.

14 MS. SANTILLO: Well, I think that that could probably
15 be cured by having a CJA lawyer appointed for Ms. Larkins, who
16 can -- I think she would be perfectly -- I don't think
17 Mr. Ashley is going to take the position that he should
18 represent her as a witness at trial. I don't think she would
19 take that position, and I think if a CJA lawyer was appointed
20 for her, and whom she could consult with on the phone, and make
21 that CJA attorney available to her for consultation, I think
22 that would be fine.

23 THE COURT: Okay.

24 MS. SANTILLO: However --

25 THE COURT: Well, before -- are you moving into a

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1 different point, or is it the same point?

2 MS. SANTILLO: Well, I want to address some of the
3 things the government just said, but to resolve this issue, we
4 can stay focused.

5 THE COURT: Okay. Well, obviously, I wanted these
6 potential witnesses here. I guess Ms. Larkins is just in a
7 different category, so there is some ambiguity. But I think
8 the way forward is to have the number one CJA lawyer who had
9 been identified as available informed that he will likely be
10 representing Ms. Larkins as a potential witness in her capacity
11 as a witness here, and then get that attorney in touch with
12 Ms. Larkins and get that attorney the information that he or
13 she needs to prepare for those considerations.

14 MS. CHOI: Yes, your Honor. I just want to be totally
15 transparent about what happened yesterday with regard to the
16 two CJA attorneys. The first person in line was Mr. Neuman,
17 the second person in line was Mr. Lee. That's James Neuman and
18 Winston Lee, for the record.

19 Because we thought Mr. Larkins and Mrs. Larkins were
20 both showing up, we provided -- because, I don't know, maybe
21 alphabetical in my own mind, we said that Mr. Neuman, who is
22 the first CJA counsel, we sent him the 3500 with regard to
23 Mr. Larkins, not Mrs. Larkins.

24 THE COURT: All right.

25 MS. CHOI: It's up to your Honor. I think --

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1 THE COURT: That's fine. I just wanted it to be --

2 MS. CHOI: Yes, right. So that's how it was, and so I
3 guess the question just becomes since Mr. Neuman is still
4 number one, if you want Mr. Neuman to be the person who talks
5 to Ms. Larkins or if you want Mr. Lee to be the one talking to
6 Ms. Larkins.

7 THE COURT: Was either of the two identified for
8 Mrs. Larkins yesterday?

9 MS. CHOI: No, Mrs. Larkins does not know about either
10 of them. They were to meet their witnesses this morning. So,
11 Mr. Neuman has familiarity, he read the documents that we've
12 sent him. He's also read Mr. Larkins' 3500. And on the
13 conversation with them, we explained the issues that may
14 implicate both of them, including, for example --

15 THE COURT: Well, then he shouldn't be appointed to
16 represent Mrs. Larkins.

17 MS. CHOI: Right. So then I think that it should be
18 Mr. Lee. I just wanted to make sure that that was all clear.

19 THE COURT: All right. So I'll ask Ms. Nunez to let
20 Mr. Lee -- it's Wilson Lee?

21 MS. CHOI: Yes, your Honor.

22 THE COURT: -- know that he will be representing
23 Mrs. Larkins -- potentially taking on the representation of
24 Mrs. Larkins for purpose of her witness testimony in this
25 proceeding.

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1 MS. CHOI: Yes, your Honor. And I don't mean to
2 overly complicate these things, but I just want to alert your
3 Honor that the CJA affidavit, we don't know -- she hasn't
4 filled it out yet. These people are, you know, of well means.
5 It's obviously up to your Honor's discretion. We have no
6 issue. I just wanted to flag that.

7 THE COURT: No, I will need to evaluate eligibility.
8 But in any event, we're going forward.

9 MS. CHOI: Yes, your Honor.

10 THE COURT: All right. I think the only frustration
11 is that she's not here, which is what we'd anticipated. When
12 we break from this conference, I'm going to ask -- Ms. Nunez
13 will let Mr. Lee know, but then I will ask the government to
14 provide the relevant information. Do you have anything?

15 MS. CHOI: Yes, your Honor. We'll produce a 3500 for
16 Mrs. Larkins that we have, just so he has a fulsome
17 understanding of what's going on. He already had the
18 background information with regard to the motions and the
19 issues that have been implicated.

20 THE COURT: And then, Ms. Santillo, I guess just for
21 my own understanding, why isn't Mrs. Larkins here?

22 MS. SANTILLO: I thought they were coming as of five
23 minutes ago, or as of right before court, I thought Bernard and
24 Mrs. Larkins were both coming. He called me and told me that
25 he was not coming. I have not spoken directly with her, but as

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1 I understood it, she has -- and I actually need to confirm a
2 hundred percent, but because she didn't believe that there
3 was -- I guess we conflated this conflict issue and this issue
4 with the criminal exposure, and so if that was a
5 misunderstanding of the order, then my apologies.

6 THE COURT: Okay. But then to the extent -- I guess I
7 need both counsel, the government and counsel for Mr. Gross, to
8 get Mr. Lee the information that he needs to be able to work
9 today, over the phone or otherwise meeting, to help advise
10 Ms. Larkins as she goes forward in --

11 MS. CHOI: Yes, your Honor, we can get the 3500 from
12 the government to Mr. Lee. I just note, again, obviously, we
13 don't -- with regard to certain of the witnesses, we did
14 receive reverse Jencks in anticipation or in relation to that
15 motion. We don't have the notes that Ms. Santillo might have,
16 and I think they may be relevant to this. Also, at some point
17 today, we anticipate getting that stuff from defense counsel
18 with regard to all the witnesses they intend to call, as they
19 had previously agreed.

20 THE COURT: Okay. Let's turn to the charging
21 conference, but when we close today, the one instruction will
22 be to have Mr. Lee and Ms. Larkins connected and Mr. Lee with
23 whatever information he needs from the government in terms of
24 background for Ms. Santillo, in terms of what's anticipated for
25 testimony, so that Mr. Lee can have the information he needs

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1 and quickly get up to speed. Assuming independent counsel
2 representation, there is no need for any type of Curcio
3 proceeding. The only remaining formality is getting the
4 financial affidavit from Ms. Larkins, so that I can assure
5 myself that she qualifies for appointment of counsel from the
6 Criminal Justice Act. And then, obviously, if not, she's on
7 her own in terms of representation. From the Court's
8 perspective, the only thing that would complicate the matter is
9 if she were to somehow return to Mr. Ashley for representation,
10 that would implicate the conflict issue, and I would need to do
11 some form of Curcio proceeding and have a CJA lawyer there,
12 et cetera.

13 So, for all of the reasons that we have discussed and
14 I have indicated in my order, I just want those eventualities
15 worked out now, today, rather than next week.

16 MS. CHOI: Yes, your Honor.

17 THE COURT: Thank you.

18 MS. SANTILLO: Yes, your Honor.

19 THE COURT: Go ahead. You wanted to raise something?

20 MS. SANTILLO: Yes. I understand that Mr. Creizman
21 has a timing issue, so if we want to proceed to the charge
22 conference, I'll raise those issues afterward.

23 THE COURT: All right.

24 MR. CREIZMAN: I apologize to the Court for my
25 tardiness.

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1 THE COURT: We've grown accustomed.

2 MS. MADRIGAL: I will vouch for Mr. Creizman on this
3 one occasion, it's actually not his fault. I don't usually do
4 that.

5 MR. CREIZMAN: Thank you.

6 THE COURT: But, Ms. Madrigal, I've noticed you're
7 always here on time, so we're in good stead.

8 There are obviously a number of issues that came in
9 last night. I have started consuming some of it. I think some
10 of it may require counterbriefing before resolution. The first
11 order of business will be the charging conference, and then, to
12 the extent I am able to take up any of the additional issues
13 that are on the table, I will, and, if not, I'll get briefing
14 and resolve those as soon as I've heard from both parties.

15 Mr. Creizman, I recognize you have a 10:45. I don't
16 know if we'll be done. So sort that as you see fit.

17 Let's turn to the charging conference. You have my
18 draft charge, which was sent to you via ECF on March 2nd,
19 yesterday. And as I indicated, what I'd like to do is, I'll
20 just ask what page the first issue that anyone wants to discuss
21 arises on, and we'll start there.

22 From the government's perspective?

23 MS. CHOI: Your Honor, two things: One is that we've
24 sort of all dealt with different legal issues as they've come
25 up over the course of the trial, and so we would just ask that

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1 if one of the three of us needs to talk about a particular
2 instruction, we be allowed to do so.

3 THE COURT: Okay.

4 MS. CHOI: I apologize for that. I know your rule.

5 THE COURT: That's fine. But on any legal issue, one
6 attorney. That will be the application of my rule to this
7 situation.

8 MS. CHOI: Okay.

9 The first thing I just wanted to note, which is not
10 really an issue with regard to the charge itself, but obviously
11 is implicated therein, is with regard to instruction number 9,
12 which is a summary of the indictment and the redacted
13 indictment that would go back to the jury. I have never had to
14 deal with this before. I have now consulted with Mr. Shin,
15 who's dealt with this before and others. In the normal
16 course -- it should be up to your Honor how you'd like to do
17 this. It seems as though the normal practice would be, you
18 take an indictment, a Word version of the indictment, and you
19 essentially rewrite it to eliminate references to other
20 defendants. In our case, obviously it's a speaking indictment,
21 we would propose leaving in the references to Anthony Murgio
22 and other coconspirators, as they exist there, but eliminating
23 a reference to their being defendants, obviously amending the
24 caption to eliminate reference to Mr. Anthony Murgio --

25 THE COURT: Let me pause you just to be efficient.

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1 The proof is always in the pudding. So I think the government
2 should make a specific --

3 MS. CHOI: Redaction application.

4 THE COURT: -- redaction proposal to defense counsel
5 and see if they agree.

6 MS. CHOI: The one thing I wanted to flag, though,
7 just for your Honor's consideration is: If we were to get rid
8 of the charges that don't implicate the two defendants here,
9 meaning like Count One and Count Two, that changes the
10 numbering of all the other counts, which obviously requires
11 some work on everyone's part to change the charge to make it
12 reflect the new redacted indictment, which is something I
13 didn't realize until thinking about this yesterday.

14 So I don't know if your Honor has a preference one way
15 or the other on that. If the idea is to redact reference to
16 Mr. Murgio, I think the cleanest thing to do might be to
17 renumber the operative counts, but it is obviously much more
18 work to do that. So that's the one thing I wanted to flag.

19 THE COURT: I don't have a default view.

20 MS. CHOI: Okay. Then we'll work it out with defense
21 counsel.

22 THE COURT: So, do it and propose it, and, hopefully,
23 you'll agree.

24 Just an update. So Mr. Lee is on his way in, so we'll
25 have him come in, and I will inform him what we're doing, and

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1 when he comes in, you can give him --

2 MR. NOBLE: Judge, we actually have the 3500 material
3 for Loretta Larkins printed, which we can hand over to Mr. Lee
4 in person when he arrives.

5 THE COURT: I don't know, Ms. Santillo, if you have
6 someone who can call Ms. Larkins and just -- she should come in
7 and meet with Mr. Lee.

8 MS. SANTILLO: Your Honor, I think it might be helpful
9 to do the financial affidavit first, because it may be that
10 she's not eligible.

11 THE COURT: Okay. Well, she needs to do that, though.
12 So is that underway?

13 MS. SANTILLO: Pardon?

14 THE COURT: Is that underway? Ms. Choi, or
15 Ms. Santillo, has she been provided --

16 MS. CHOI: Your Honor, I think that the financial
17 affidavits were sent to CJA counsel, so CJA counsel has it. I
18 don't think -- obviously, he hasn't been in contact with her,
19 so it's not underway from our understanding.

20 THE COURT: So when he comes in, I'll tell him
21 basically what's going on. I will ask you to provide
22 Ms. Larkins' contact information to Mr. Lee, so that he can at
23 least get the financial affidavit, and we can see where we are
24 with that and otherwise put him in touch with her for
25 representation purposes.

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1 MS. SANTILLO: That's fine. And I'm happy to call
2 her. I just didn't know they were not coming until --

3 THE COURT: I understand.

4 So that's instruction 8, which I notice it should be
5 on a separate page, so my law clerk is going to track changes
6 to the draft charge. On page 12, instruction number 8 is --
7 for some reason, there should be a page break there.

8 Is there anything before page 12?

9 MR. CREIZMAN: Yes.

10 THE COURT: Go ahead, Mr. Creizman. What page?

11 MR. CREIZMAN: Page 5. And it's lines 10 to 11.

12 THE COURT: Pull up the microphone, please.

13 MR. CREIZMAN: I'm sorry.

14 It's page 5, instruction number 2, "Role of the Jury,"
15 lines 10 to 11. I would request that it should say, "You
16 should bear in mind particularly that questions put to
17 witnesses, although they provide the context for answers, are
18 not themselves evidence. It is only the answers that are
19 evidence."

20 THE COURT: I'm just reading what you said, please.

21 Ms. Choi?

22 MS. CHOI: No objection, your Honor. That's the law,
23 so...

24 THE COURT: I think I would just amend it to say,
25 "Although they can provide context."

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1 MR. CREIZMAN: Okay.

2 THE COURT: So the change we'll make here on page 5,
3 at line 11, the sentence that begins, "You should bear in mind
4 particularly that questions put to witnesses, although they can
5 provide the context for answers, are not themselves evidence.
6 It is only the answers that are evidence."

7 MR. CREIZMAN: Thank you.

8 THE COURT: Thank you.

9 Between page 5 and 12? Don't be sheepish. I don't
10 mind.

11 MR. CREIZMAN: I'm sheepish a little on this one, but
12 it's something that I'd like to have in there. On page 10,
13 instruction number 6, "Presumption of Innocence in the Burden
14 of Proof." First of all, lines 7 through 9 are probably
15 necessary since we did put in evidence. So that would be my
16 first request. And then on line 11 --

17 THE COURT: So I just want to make sure everyone
18 agrees that 7 through 9 is called for?

19 MS. CHOI: No objection, your Honor.

20 MR. CREIZMAN: Then --

21 THE COURT: Ms. Santillo?

22 MS. SANTILLO: Yes. No objection.

23 THE COURT: So, on line 7, we'll cut the bracket, if
24 necessary, colon and then cut the bracket at the end of line 9.

25 Go ahead, Mr. Creizman.

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1 MR. CREIZMAN: Thank you.

2 And then on line 11, after each of them, just add the
3 words "into your deliberations."

4 THE COURT: "Presumption was with them when the trial
5 began and remains with each of them into your deliberation"?

6 MR. CREIZMAN: Yes, I like saying that in my closing,
7 if possible. Not just that, I think it's true, it is the law.

8 THE COURT: "Into your," okay, I understand.

9 Ms. Choi?

10 MS. CHOI: Your Honor, I think it's just confusing,
11 given that you will give later instructions on how they should
12 deliberate. It's not necessary. I understand his point that
13 he wants to make it in closing, but he has other parts of the
14 charge that he can use for that.

15 MR. CREIZMAN: I will cite authority. Judge Rakoff,
16 in United States versus Lumiere, which the government should be
17 very excited about --

18 MS. CHOI: Excited?

19 MR. CREIZMAN: -- based on the result in that base.

20 MS. CHOI: Was that your last trial, Mr. Creizman?

21 MR. CREIZMAN: Yes, it was.

22 MS. CHOI: Fair enough.

23 THE COURT: Well, Ms. Santillo, do you have any
24 objection?

25 MS. SANTILLO: No.

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1 THE COURT: I'll allow the change. I think it's
2 correct. So page 10, line 11, the sentence that begins, "The
3 presumption was with them when the trial began and remains with
4 each of them," insert "into your deliberations."

5 "Into your deliberations"?

6 MR. CREIZMAN: Or "as you deliberate," something along
7 those lines.

8 THE COURT: Well, what did you persuade Judge Rakoff
9 to use?

10 MR. CREIZMAN: I didn't persuade Judge -- Judge Rakoff
11 had his instructions and -- I may have persuaded him on a
12 couple of things, but on that one, it just said "into your
13 deliberations," so I just used that. In other cases, I think
14 I've seen "as you deliberate in the jury room," something along
15 those lines. I can look up -- I think I have it on my phone --
16 Judge Oetken's charge in the Danilovich -- or I'm sorry, the
17 Zemlyansky case, and it said something similar.

18 THE COURT: I think "as you deliberate" is a little
19 clearer, so "The presumption was with them when the trial began
20 and remains with each of them as you deliberate unless and
21 until you are convinced..."

22 MR. CREIZMAN: Yes.

23 THE COURT: Between pages 10 and 12?

24 Next page after 12?

25 MS. CHOI: Your Honor, it's just a minor point, but on

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1 page 18, I just wanted to flag one thing --

2 THE COURT: Go ahead.

3 MS. CHOI: -- for your Honor, which is that with
4 regard to certain of accounts, you do have in the elements the
5 times alleged in the indictment and not with regard to other
6 counts. You, of course, then also have a separate instruction
7 about times, relevant times, with regard to the charge. So I
8 just wanted to say, just with regard to consistency, it may
9 make sense to either have them in in all the places or not.

10 THE COURT: I'm sorry, I'm not tracking.

11 MS. CHOI: Your Honor, on page 18, you say, "Beyond a
12 reasonable doubt is that at the time of the events alleged in
13 the indictment." I think with regard to some of the counts,
14 when you describe the counts, you have similar language in
15 there, but not with regard to others. Like I don't think that
16 it's actually in the conspiracy charge. And then you have a
17 separate charge with regard to relevant times in the
18 indictment. So it's a minor point, but just for consistency, I
19 just wanted to flag that, that maybe it makes sense to either
20 have them in each portion of the charge that deals with an
21 independent count or just have that last charge.

22 THE COURT: All right. Well, let's leave this one as
23 it is, and then if there are places that you would encourage
24 inclusion for consistency, I'll take that request.

25 MS. CHOI: Okay.

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1 MR. NOBLE: Judge?

2 THE COURT: Yes.

3 MR. NOBLE: Back one page, on 17, line 6, just
4 "Lebedev" is misspelled.

5 MR. CREIZMAN: No objection.

6 THE COURT: So page 17, line 6, which is instruction
7 number 13, correcting the spelling of "Lebedev."

8 Does defense counsel have anything before page 18?

9 MS. SANTILLO: Yes, your Honor. I wanted to raise an
10 issue with respect to page 13, the summary of the indictment.
11 As you are probably aware, last night there were several
12 filings with respect to sort of the scope of the conspiracy
13 that's alleged in the indictment.

14 THE COURT: Could you pull the mic a little closer?

15 MS. SANTILLO: Sorry.

16 THE COURT: That's all right. Thank you.

17 MS. SANTILLO: We had several filings with respect to
18 the scope of the conspiracy that's alleged in the indictment,
19 and we think, given the fact that there has been so much
20 testimony about all of these other aspects of the conspiracy,
21 that it would be critical to include within the summary of the
22 indictment the specific conspiracy that has been charged.

23 Obviously, I think that we'll have debate about that
24 with the government, depending on the outcome of the Court's
25 rulings with respect to the motions and instructions that we

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1 filed yesterday, but to the extent that we're going to have a
2 summary of the indictment, I think it's critical that whatever
3 resolution we reach should be included in that summary because,
4 otherwise, the objects of the conspiracy are viewed in a
5 vacuum, and I think it invites the jury to convict the
6 defendants based on things that were not charged in the
7 indictment.

8 THE COURT: All right. Ms. Choi?

9 MS. CHOI: Your Honor, this is for Mr. Shin.

10 THE COURT: Go ahead, Mr. Shin.

11 MR. SHIN: Your Honor, just on this specific point, I
12 don't think that's necessary, your Honor. The purpose of this
13 summary, clearly, is just to provide the very barebones
14 charges. For example, for every other count other than
15 Count Three, there is no factual recitation underlying the
16 charge. For example, Counts Six, Seven, and Eight just say
17 conspiracy to commit wire fraud and bank fraud, wire fraud,
18 bank fraud. There's no specific factual recitation that
19 accompanies that, so that's not really the purpose of this
20 summary of the charges as I see it.

21 Maybe this is an appropriate time, also, your Honor:
22 In light of the filings that were made late last night and
23 obviously what's come before, it seems that there are several
24 issues that have been teed up that are all interrelated. Two
25 of them, I think, are implicated in the charges. One is the

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1 withdrawal charge that was requested by the defense and which
2 the Court included over the government's objection. Two is the
3 multiple conspiracies charge proposed by Mr. Creizman.

4 MR. CREIZMAN: No.

5 MR. SHIN: I'm sorry, I misspoke. I misspoke.
6 Proposed by Defendant Gross. And then Mr. Creizman's filing
7 late last night regarding a request for instructions on the
8 grounds that the failure to give such instructions would
9 constitute a constructive amendment of the indictment.

10 THE COURT: Right.

11 MR. SHIN: It seems to me those are all interrelated,
12 your Honor, and they're also related to the briefing that
13 Ms. Santillo and the government already submitted regarding her
14 request for a limiting instruction on the eCommerce PMA and the
15 post-November evidence.

16 It seems all those are interrelated. So, what the
17 government would propose is that it may be time, perhaps over
18 the weekend, your Honor, for us to kind of have an all-in
19 briefing on these various interrelated issues because I think
20 it will help your Honor address them all in a consistent
21 sensible fashion, and it will also force the parties to really
22 lay out how those various issues interrelate and set forth our
23 positions on all of them. Your Honor has only received
24 briefing from the parties on discrete subsets of those
25 interrelated issues, and so the government would suggest that

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1 the Court defer any further ruling on the withdrawal charge, on
2 the multiple -- the proposed multiple conspiracies charge, and
3 on the constructive amendment claim until the Court has had the
4 opportunity to see briefing by the parties. Perhaps the
5 parties can make simultaneous submissions by the end of the
6 weekend or something along those lines, given that there is
7 still time to adjust those specific charges, as necessary,
8 before the final instructions are given to the jury.

9 THE COURT: All right. I think that would be helpful.
10 I have not more than skimmed the new issues that came in last
11 night. I had sort of thought that the withdrawal issue was
12 fully briefed, but became aware of the interrelatedness of the
13 new issues, and I think it would be helpful to me to get sort
14 of a single set of briefings from each side that deals with
15 them in an omnibus way. I accept that suggestion, and we just
16 need the specifics of the proposal.

17 Let me pause for a moment. I see Mr. Lee has come in.
18 Mr. Lee, thank you for being here. Mr. Lee, I think what makes
19 sense is for me to just tell you briefly what's going on --

20 MR. LEE: Yes, your Honor.

21 THE COURT: -- and then let the lawyers connect you to
22 the potential witness client.

23 MR. LEE: Yes, your Honor.

24 THE COURT: The witness, who the defense intends to
25 call -- who, by our most recent information, is likely to be

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1 called as a defense witness has up to this point been
2 represented by Cedric Ashley. Mr. Ashley also represents Hope
3 Cathedral, which is the church that one of the defendants in
4 this case, Trevon Gross, is the pastor of, and that he is
5 connected to both that church as well as HOPE FCU, which is the
6 credit union that is at the center of many of the charges here.

7 I think that -- and the government has identified a
8 potential conflict because Mr. Ashley represents the entity,
9 Hope Cathedral, the church, which may face financial or other
10 ramifications if Mr. Gross is convicted, and so there appears
11 to be a conflict between Mr. Ashley's representation of the
12 church and Ms. Larkins, who is the --

13 Counsel, can you remind me of her position?

14 MS. SANTILLO: She's the treasurer.

15 MS. CHOI: Yes, she's the director of finances, she's
16 the pastor of finances, I think. Pastor administration is the
17 way that it's written up.

18 THE COURT: The pastor of administration at the
19 church?

20 MS. CHOI: Yes, your Honor. And in that capacity, for
21 instance, just so Mr. Lee can be aware, she deals with the
22 church's finances, she deals with the tax disclosures that are
23 necessary, and it appears, also, that she signed loan documents
24 on behalf of the church for loans that were taken out from HOPE
25 FCU. (Continued on next page)

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1 THE COURT: I'll state first, Mr. Lee, I'm not certain
2 that she qualifies for appointment of counsel, so I think step
3 one is putting you in touch with her and I get the financial
4 affidavit information. She is not here, which had been my hope
5 and expectation, and everyone's hope and expectation. Counsel
6 for Mr. Gross learned five minutes before this conference began
7 that she wasn't going to be here, but we're still under the
8 impression that she will be testifying on behalf of Mr. Gross.
9 So I'm just trying to sort all of this out in advance of next
10 week when she may be called.

11 I think the next steps are, I've asked counsel, they
12 have materials to give you, further materials to situate you in
13 the case, and then contact information for Ms. Larkins, and I
14 think the first step will be a determination of whether she
15 qualifies for appointment of counsel.

16 MR. LEE: Okay.

17 THE COURT: Why don't we just pause. Since she's not
18 here and we don't know exactly why, why don't I pause here so
19 that the contact information and other materials can be given
20 to Mr. Lee, and he can proceed to be in touch with Ms. Larkins.

21 MS. CHOI: Yes, your Honor. I presume Ms. Santillo
22 has her contact information readily available. The 3500 we
23 have, Ms. Grant is running back to grab it, and we'll bring a
24 copy shortly, so I apologize for the delay.

25 THE COURT: Go ahead, Ms. Santillo.

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1 MS. SANTILLO: Could I take a three-minute break and
2 tell her this is coming and give him the contact info?

3 THE COURT: Yes. Why don't I step down and I'll
4 return in a few minutes.

5 (Recess)

6 THE COURT: I gather that we have the process of
7 Mr. Lee and Ms. Larkins under way?

8 MS. SANTILLO: Yes, your Honor. They're speaking on
9 the phone as we speak. I think it's likely Ms. Larkins will
10 not qualify for a CJA lawyer and she's exploring further
11 options for counsel.

12 THE COURT: Great, thank you.

13 Where were we? Mr. Shin, you proposed bringing these
14 pieces that now seem to need to come together, together through
15 briefing.

16 MR. SHIN: Yes, your Honor. The government would
17 anticipate that its brief would address the withdrawal charge.
18 We had objected to it in the joint request of charge that was
19 submitted, but because we had an overall objection to it, we
20 didn't line edit it, so I anticipate that that portion of our
21 brief would lay out our position on the withdrawal charge
22 overall, and if the Court were to give it, propose particular
23 edits to the language, as well. So this would all be one
24 issue.

25 We would also anticipate addressing the, ultimately,

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1 multiple conspiracies charge that was proposed by Ms. Santillo.
2 And again, just in the hopes that this is kind of the last
3 brief on this topic, we'll give our position on it, and also
4 propose -- put together language if the Court were to decide to
5 give it.

6 And finally, given that we've already addressed the
7 issues raised by Ms. Santillo and her request for a limiting
8 instruction, I think your Honor already has that from our
9 filing at 5:00 p.m. yesterday and Ms. Santillo's response.

10 The last topic the government would anticipate
11 addressing would be Mr. Creizman's argument that his client
12 should be entitled to certain limiting instructions, and if he
13 were not given those instructions -- if the Court were not to
14 give those instructions, it would constitute a constructive
15 amendment. So unless I hear other issues raised currently by
16 Mr. Creizman or Ms. Santillo, I would anticipate that that's
17 what our brief would address.

18 And just in terms of efficiency, the government would
19 propose simultaneous briefing, let's say by 5:00 on Sunday, so
20 the Court would have -- I think that would give the Court time
21 to address -- because I don't think this is something that
22 needs to be addressed first thing on Monday morning. The Court
23 would have it and could address it later in the week if need
24 be, and then the defendants could also -- I believe to address
25 those various topics, each of them would also need to address

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1 some subset of those, and then your Court could have all that
2 in by Sunday.

3 THE COURT: I think I'll probably push it earlier in
4 the day by Sunday so I have more time to address it, because
5 once Monday morning comes, I'm occupied.

6 MR. SHIN: Understood, your Honor. We would just
7 request that the submissions be made simultaneously, given that
8 we filed our response yesterday at 5:00 and --

9 THE COURT: Yes. I think everybody sees what the
10 others -- well, anyway, there's no time for anything other than
11 simultaneous.

12 Mr. Creizman.

13 MR. CREIZMAN: I have no objection to the idea of
14 simultaneous briefing in principle, although we've already laid
15 out our argument. I guess I can anticipate what the government
16 is going to respond, but that's --

17 THE COURT: In a way, it just gives you another bite
18 at the apple.

19 MR. CREIZMAN: That's true. I'll take that as a hint
20 that you're not totally convinced.

21 And then, in addition, I mean -- but I will note that
22 the constructive amendment argument that we made actually is
23 the same reason we had posed the multiple conspiracies charge
24 that Mr. Gross has proposed.

25 THE COURT: Yes, right. That's the interrelation of

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1 the issues, but --

2 MR. SHIN: Right. And just I would note that I read
3 Mr. Creizman's letter this morning very quickly, as well, your
4 Honor, and I think the rationale of one of the limiting
5 instructions was essentially that a withdrawal argument --
6 because I believe Mr. Creizman argued that evidence post
7 November 24th -- or 22nd, 2014, essentially, the argument
8 you've been hearing from Mr. Gross, it sounded like some
9 version of that was raised by Mr. Creizman in his letter as a
10 reason for one of the limiting instructions that he requested.
11 So again, that just illustrates the interrelatedness of all of
12 these issues.

13 THE COURT: Right. Okay.

14 Ms. Santillo.

15 MS. SANTILLO: I just want to note two things. One is
16 that I join in large part in Mr. Creizman's motion that he
17 filed last night. The second is, I just question the
18 efficiency of the simultaneous briefing on this particular
19 issue given the fact that the defendants have teed up these
20 issues, and I just don't even know what the government's going
21 to say, so it just doesn't make -- to me, I don't know what to
22 respond to at this point given their representation that
23 they're going to be trying to challenge multiple things that
24 we've proposed and tie it altogether and, you know, I'm just
25 not really sure what I'm responding to.

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1 THE COURT: That's fair enough. Why don't we do this.
2 Why doesn't the government do its brief by noon on Sunday, and
3 then let's say 3:30 or something, response brief by the
4 defense.

5 MR. CREIZMAN: That's fine.

6 THE COURT: Is that enough time?

7 MR. CREIZMAN: Yes.

8 THE COURT: Ms. Santillo?

9 MS. SANTILLO: That's fine.

10 THE COURT: I mean, do some anticipating, I think, and
11 as you say, in a sense, this is a short opportunity for reply
12 now that they're going to respond and take on the issues
13 together. I think that's the best we can do.

14 MR. SHIN: Thank you, your Honor.

15 THE COURT: The other issue that came in, which I
16 think we should just give the government an opportunity to
17 respond to -- written if they want, if not then we can take it
18 up at the end -- is the request on behalf of Mr. Lebedev for
19 information relating to the government's investigation of the
20 statement by Agent Beyer to Mr. Freundt.

21 MS. CHOI: We can take that up orally, your Honor. I
22 don't think it's going to require additional briefing. We can
23 take it up at the end of the conference.

24 THE COURT: All right. I think that's plenty.

25 MR. SHIN: So your Honor, before I propose this detour

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1 into these other issues, I think what was on the table was
2 Ms. Santillo's request on page 13. And so just to close the
3 loop on that, I would just reiterate that the purpose of this
4 page clearly is not to lay out the factual basis for each one
5 of these counts, each of these descriptions appears to simply
6 essentially name the offense kind of in shorthand or --

7 THE COURT: Would a compromise be to do less rather
8 than more so that, as to Count Three, Lebedev and Gross,
9 charged with conspiracy. "Conspiracy charged in Count Three
10 has four objects that are described in the indictment," period?

11 MR. SHIN: That would be acceptable to the government,
12 your Honor.

13 THE COURT: And that way, I think I heard your
14 concern, Ms. Santillo, that given the additional information
15 about the objects and the potential confusion that that sets
16 into, it's sort of unfair to have added that factual material.
17 That's my compromise. Is that agreeable?

18 MS. SANTILLO: That sounds like a good compromise to
19 me, your Honor.

20 THE COURT: Mr. Creizman?

21 MR. CREIZMAN: Yes, your Honor.

22 THE COURT: All right.

23 Page 13 then, instruction 9 beginning on line 7. The
24 first sentence will remain, and then the second sentence, "The
25 conspiracy charged in Count Three has four objects or goals

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1 that are described in the indictment," period, and then we'll
2 cut the remainder of that paragraph on lines 8 through 11. All
3 right?

4 Next page.

5 MR. CREIZMAN: My next page would be 20, but --

6 THE COURT: Anything before 20? All right, page 20.

7 MR. CREIZMAN: Yes, your Honor. What we request is
8 that the first -- that two sentences in the last paragraph be
9 moved to the end of the first paragraph, basically, and it
10 would go after -- I guess there's one sentence in the first
11 paragraph. So it would say, "It is not necessary for the
12 government to prove that Trevon Gross" --

13 THE COURT: I'm sorry. Can you just point me to the
14 line?

15 MR. CREIZMAN: Sure. Line 7.

16 THE COURT: Page 20?

17 MR. CREIZMAN: Page 20, instruction number 16.

18 THE COURT: Okay. So right now line 7 --

19 MR. CREIZMAN: Ends with "union".

20 THE COURT: So you're proposing an addition there that
21 would read -- go ahead.

22 MR. CREIZMAN: "It is not necessary for the government
23 to prove that Trevon Gross had the authority to perform the
24 acts allegedly sought to be influenced or rewarded. Nor is
25 it" -- okay. "Also, if you find that Yuri Lebedev acted with

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1 the intent to reward Trevon Gross for a decision already made,
2 it does not matter that the payment was not made or offered
3 until after the decision was made."

4 THE COURT: Are those lines from somewhere else or --

5 MR. CREIZMAN: They're adopted from lines 18 through
6 23.

7 THE COURT: Can we start with the question, before we
8 turn to editing it, so the first suggestion is to take the
9 material on lines 18 to 23 and move it to the first paragraph.

10 MR. CREIZMAN: That's right. And with a bit of
11 editing of the language. Because what I find a bit concerning
12 about the language from 13 to 21 is that it sort of repeats,
13 like "If you find Yuri Lebedev is guilty", "If you find Yuri
14 Lebedev's intent to corruptly influence," it just seems that
15 the way it's worded in that paragraph necessarily is going to
16 have to include that type of language, whereas if you move the
17 language about what the government has to prove and doesn't
18 have to prove to the first paragraph, that seems more
19 appropriate in that context and it's less prejudicial, I think,
20 to Mr. Lebedev. It's just a sensitivity I have in the way it's
21 worded, so it's easier -- meaning on line --

22 For example, on line 16, it says, "In order to find
23 Yuri Lebedev guilty, the government does not have to prove that
24 Trevon Gross had a corrupt intent" -- I'm sorry -- right -- and
25 so forth. Whereas it would be easier if we didn't have to say,

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1 "In order to find Yuri Lebedev guilty", we could move it to the
2 end of the first paragraph, because it seems like what the
3 government has to prove -- the elements that it has to prove
4 and doesn't have to prove, and then it would say, "It is not
5 necessary for the government to prove that Trevon Gross had the
6 authority to perform the acts allegedly sought to be influenced
7 or rewarded."

8 And then even though -- on line 20, which is -- I'm
9 sorry. So actually -- all right. I guess -- okay. Sorry.
10 I'm starting with line 18 through line 23. Those are the lines
11 that I'm trying to move up to line 7.

12 THE COURT: Okay. Let's start with that, and then we
13 can take on the editing part.

14 MR. CREIZMAN: Okay.

15 THE COURT: Ms. Choi?

16 MS. CHOI: Your Honor, I just think that the way in
17 which your Honor has proposed -- and I believe it's the way
18 that the parties originally proposed -- makes sense. Because
19 it says very quickly at the top what the third element is, and
20 then it goes to defining what the specific portion is that's
21 the crux of the matter, which is the corruptly situation.

22 I think the reason why lines 18 through 23 are at the
23 bottom of that page is because that's sort of a last thought in
24 the process, and I think moving it to the beginning just causes
25 confusion with regard to the logic in which this charge, and

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1 all other charges relating to this case, lay out what the
2 charge is and what the charge means.

3 And that's putting aside the objections that we would
4 have with regard to Mr. Creizman trying to make the charge --
5 convert the charge from active voice to passive voice in a way
6 to make it more neutral. This is a charge charging Yuri
7 Lebedev. It would be confusing if we start going into
8 hypotheticals about who these actors are. The active voice is
9 the clearest way to do this, not to try to make it passive and
10 confusing to the jury about who the relevant actors are.

11 This is a substantive charge, your Honor. It needs to
12 be about the defendants' actions.

13 THE COURT: All right.

14 MR. CREIZMAN: My concern, though, is that is that you
15 have, starting on line -- I mean, my just concern was that it
16 keeps repeating over and over that "If you find that Yuri
17 Lebedev had the intent to do this, and if you find that Yuri
18 Lebedev had the intent to do this." I mean, I'm fine -- I
19 guess I don't have -- there are other -- I guess there are
20 other changes that I would make -- that I would propose -- if
21 the Court is inclined to go along with what Ms. Choi proposes,
22 I still have additional changes. So maybe --

23 THE COURT: All right. Well, I do think -- so this
24 came in as a joint proposal originally. I think I've adopted
25 exactly what was proposed. I'd be open to some different

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1 specific suggestions, but Mr. Creizman, I think what you have
2 thus far suggested would add confusion and not clarity.

3 MR. CREIZMAN: Okay. Then even if we keep the last
4 two sentences as they are --

5 THE COURT: Right.

6 MR. CREIZMAN: -- here's how I would change lines 13
7 through 18. "The relevant question for your consideration with
8 respect to Count Four is Yuri Lebedev's intent, not Trevon
9 Gross' intent." That seems simpler, and I don't know what the
10 need is for "the subsequent actions of Trevon Gross or HOPE
11 Federal Credit Union".

12 And then the next sentence, I would like to take out
13 "in order to find Yuri Lebedev guilty", and just start with
14 "the government does not have to prove that", and then I would
15 be fine with that formulation.

16 THE COURT: Do you have that specific proposal in
17 mind, Ms. Choi?

18 MS. CHOI: I mean, sort of. I think --

19 THE COURT: I want you to react to the specific
20 proposal, so let me see if I can restate it.

21 MS. CHOI: Sure.

22 THE COURT: It's alterations -- so not changing the
23 order as it's currently presented as already rejected by me,
24 but changing lines 13 through 17 to read -- 13 through 18, "The
25 relevant question for your consideration with respect to Count

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1 Four is Yuri Lebedev's intent, not Trevon Gross' intent." And
2 then cutting -- then just say, "In order to find Yuri Lebedev
3 guilty" -- actually, I can't make it out.

4 Why don't you -- I tried to get it from the -- if you
5 could just read straight through, Mr. Creizman, what you
6 propose as a substitute for lines 13 through 18.

7 MR. CREIZMAN: Sure. So I would strike "or the
8 subsequent actions of Trevon Gross or HOPE Federal Credit
9 Union".

10 THE COURT: Let me ask you to just state in completion
11 rather than in sort of editing parlance of how you would like
12 13 to 18 to read.

13 MR. CREIZMAN: Sure. Okay. "The relevant question
14 for your consideration with respect to Count Four is Yuri
15 Lebedev's intent, not Trevon Gross' intent. The government
16 does not have to prove that Trevon Gross had a corrupt intent,
17 corruptly accepted any payment, or that a payment corruptly
18 influenced any business or transaction of HOPE Federal Credit
19 Union."

20 THE COURT: And then it would pick up with, "nor is it
21 necessary"?

22 MR. CREIZMAN: Yes.

23 THE COURT: Seems okay.

24 What do you think, Ms. Choi?

25 MS. CHOI: Yes, your Honor, I think that that's fine.

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1 The one hesitation I have is, if I could just have a moment,
2 because I wouldn't want this to then -- I would want a parallel
3 instruction with regard to the receipt, I think, because I just
4 haven't thought about that in the abstract. I think that the
5 point -- I don't think there's anything wrong with the
6 language, I just want to see how it would play out with regard
7 to the other count.

8 THE COURT: All right. Why don't we --

9 MR. CREIZMAN: On that, I think I concur. And on
10 that, I think we could accomplish that at least with deleting
11 one sentence starting on page 22, line 23, "Even if you find
12 that Yuri Lebedev acted with a corrupt intent, you may not find
13 Trevon Gross guilty unless you find that he also acted with a
14 corrupt intent." That seems -- I mean, there's no
15 corresponding language in Yuri Lebedev's charge that says,
16 "Even if you find Trevon Gross acted with a corrupt intent, you
17 may not find Yuri Lebedev guilty unless you find that he also
18 acted with a corrupt intent."

19 MS. CHOI: I think that's my concern, your Honor. I
20 think the reason the language was the way that it was was so
21 that the jurors are not confused that their conclusion with
22 regard to one defendant on the payment of the bribe means
23 necessarily that the receipt of the bribe is also a conviction.
24 So my concern is just that, if we were to take out that
25 language from 22 and 23, and the reason it was in there was to

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1 bring clarity to the fact that these are two separate counts
2 for which they have to make that evaluation independently, I
3 think there may be confusion from the jurors' perspective
4 about, well, if we've already concluded that Mr. Lebedev acted
5 corruptly to pay the bribes, then obviously, Mr. Gross, as the
6 object of the bribe, acted corruptly as well. So that's why I
7 think that that language is necessary somewhere, either in both
8 places, or at least with regard to where it is presently,
9 because otherwise, I think -- I don't have any problem on its
10 face with the way that Mr. Lebedev has suggested amending page
11 20, but I think if we do that, and also take out that second
12 portion with regard to the receipts object, it will become
13 confusing to the jury.

14 MR. CREIZMAN: May I just suggest, though, if you look
15 at page 22, lines 21 to 23, there is the sentence that precedes
16 "even if you find" which says, "Here, it is Trevon Gross'
17 intent in accepting the payments that is the relevant question,
18 not the intent of the person or persons offering or making the
19 payments." So that seems to me to be symmetrical.

20 MS. CHOI: Symmetry is not the issue, I think it's
21 that that last sentence goes that extra point to really bring
22 home to the jury that those two counts can't be done -- you
23 can't conclude one thing about one count and then necessarily
24 conclude that the recipient of that bribe is also guilty. I
25 think that's important.

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1 THE COURT: So you're arguing that Mr. Creizman's
2 suggestion would prejudice the defendants? Am I understanding
3 that?

4 MS. CHOI: I think, yeah, I mean, I think -- it's not,
5 I think, prejudicing the defendants, it's more causing juror
6 confusion.

7 THE COURT: But the confusion that you're expressing a
8 concern about is that they would sort of automatically conclude
9 the other's guilt from the others?

10 MS. CHOI: Yes. And that's why that language was
11 proposed and agreed upon, it's because you need to have that
12 analysis done separately.

13 MS. SANTILLO: In Trevon Gross' count, can I weigh in
14 for a second? I think that I tend to agree with Ms. Choi on
15 this one. But I also think that part of it is also confusing
16 because before it was Anthony Murgio and Yuri Lebedev and there
17 were other people who were involved in the conspiracy who were
18 morphed into it. So I don't know if maybe we could find
19 clarity for respect for Mr. Lebedev to say that it's only his
20 intent or something like that, but I don't want to lose sight
21 of the fact that the recipient of the bribe and the person who
22 was paying the bribe have to both have corrupt intent.

23 THE COURT: That does seem important.

24 MR. CREIZMAN: The only thing I would suggest is that
25 on lines 21 to 23 --

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1 THE COURT: Which page?

2 MR. CREIZMAN: -- on page 22, I think that we have a
3 sentence there that actually accomplishes the points that
4 Ms. Choi and Ms. Santillo are making, which is, "Here, it is
5 Trevon Gross' intent in accepting the payments as the relevant
6 question, not the intent of the person or persons offering or
7 making the payments." And we could restructure it to sound the
8 same way that the way I'm proposing Yuri Lebedev sounds, which
9 is, "For the purposes of Count Five, the relevant question for
10 your consideration is Trevon Gross' intent, not Yuri Lebedev's
11 intent or the parties who made the payments."

12 I mean, but the problem that I have with the sentence
13 afterwards is that it suggests almost to the jury that -- I
14 mean, it makes the same point again, but it makes it in a way
15 that is suggesting that you found Yuri Lebedev --

16 THE COURT: Well, so it's not quite the same point,
17 and it seems to me a necessary -- it adds the additional point,
18 it's Mr. Gross' intent, and further, it's separating the intent
19 of the two defendants. But I wonder if we couldn't just
20 accomplish what you're saying with some kind of comma clause.
21 So "Even if you find that Yuri Lebedev acted with a corrupt
22 intent, comma, and you may only do so pursuant to my earlier
23 instructions" or something along those lines, comma, that
24 reminds the jury that they have to -- they only get to that
25 point if they've gone through the full process of being

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1 convinced beyond a reasonable doubt with respect to
2 Mr. Lebedev's intent.

3 MR. CREIZMAN: That sounds -- and I may have a
4 proposal on that which would be, though, just -- that it would
5 make the same point, but we'd be less prejudicial to
6 Mr. Lebedev, which would be, "Even if you find that the persons
7 who made the payments acted with a corrupt intent, you may not
8 find Trevon Gross guilty unless you find that he also acted
9 with a corrupt intent." Because it also -- again, I mean, I
10 just feel that it just sort of singles out Yuri Lebedev in this
11 situation, and I think that, you know, number one, when we all
12 had to work together amongst defense counsel, it was editing
13 back and forth and back and forth and --

14 THE COURT: Well, you resubmitted.

15 MR. CREIZMAN: Right.

16 THE COURT: You resubmitted.

17 MR. CREIZMAN: That's true.

18 THE COURT: But so the specific suggestion is, this is
19 page 22, line 23, "Even if you find that," and instead of
20 saying Yuri Lebedev it says?

21 MR. CREIZMAN: "The persons who made the payments"
22 or --

23 THE COURT: How about, "Even if you find that payments
24 were made to Mr. Gross with a corrupt intent, you may not find
25 Trevon Gross guilty unless that you find he also acted with a

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1 corrupt intent."

2 MR. CREIZMAN: I think that's great. I think that's
3 amazing.

4 THE COURT: Ms. Santillo?

5 MS. SANTILLO: I think that's fine.

6 THE COURT: Ms. Choi?

7 MS. CHOI: I don't think we have an issue with that.

8 THE COURT: Let me just get that one in, and then we
9 can go back.

10 So page 22, instruction number 18, line 23 will now
11 read, "Even if you find that payments were made to Mr. Gross
12 with a corrupt intent, you may not find Trevon Gross guilty
13 unless you find he also acted with a corrupt intent."

14 I think we'll deal at the end with just uniformity of
15 addressing the defendants as "Trevon Gross" or "Mr. Gross" and
16 the like, because, as I was reading that sentence, there was
17 inconsistency. But let's bracket that because it's not
18 important at the moment.

19 So returning to instruction 16, we had an agreed
20 proposal. Does anyone recall what it was? Do you have it?

21 MR. CREIZMAN: On page 20. My proposal -- I was
22 just -- I mean, I'm fine -- I would prefer if on line 16 it
23 didn't say "in order to find Yuri Lebedev guilty", just
24 starting with "the government does not have to prove", but I'm
25 not -- you know, it's not a critical point. I don't think it's

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1 that prejudicial, it's unduly prejudicial.

2 THE COURT: So you're fine with instruction 16 as it
3 is? We had talked about a change. Everybody has kind of --
4 there was an edit of 18 through 23. Everybody had kind of
5 agreed.

6 MR. CREIZMAN: Oh, I'm sorry. I thought line 16. No.
7 The way I would like it still would be to say -- the first
8 sentence of the last paragraph, starting at line 13 should
9 read, "The relevant question for your consideration with
10 respect to Count Four is Yuri Lebedev's intent, not Trevon
11 Gross' intent. In order to find Yuri Lebedev guilty, the
12 government does not have to prove that Trevon Gross had a
13 corrupt intent," and so on. I'm fine with the rest of that.

14 THE COURT: Ms. Choi?

15 MS. CHOI: That's fine, your Honor.

16 THE COURT: All right. We'll make that change.

17 MS. CHOI: Just to be clear, the only changes that are
18 happening then are with regards lines 13 through 16? Just that
19 first sentence, and nothing else on that page, correct?

20 MR. CREIZMAN: That's correct.

21 MS. CHOI: Okay.

22 THE COURT: Okay.

23 MR. NOBLE: Judge, just one grammatical thing.

24 Line 10.

25 THE COURT: Line 10.

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1 MR. NOBLE: I think it's just, we're missing a "has".
2 So "or as it sometimes been expressed" should be "or as it
3 sometimes has been expressed" or "as it sometimes has been
4 expressed".

5 THE COURT: This is on page 20.

6 MR. NOBLE: Line 10.

7 THE COURT: "This involves conscious wrongdoing or as
8 it's" -- right -- "sometimes has been expressed"?

9 MR. NOBLE: Yes.

10 THE COURT: Okay.

11 MR. CREIZMAN: Just one actually additional point.
12 For the first sentence, "The relevant question for your
13 consideration with respect to Count Four is Yuri Lebedev's
14 intent, not the intent of Trevon Gross or any of Mr. Lebedev's
15 alleged coconspirators," if that makes sense. If not, I'm fine
16 leaving it as the way I just left it.

17 MS. CHOI: Yeah, I mean, I think it's fine as is. I
18 know that this is also --

19 THE COURT: Okay. Fine as is.

20 MR. CREIZMAN: Yes.

21 THE COURT: Music to my ears.

22 MR. CREIZMAN: I'm sorry.

23 THE COURT: Next page. So we've resolved the issues
24 on 20 and 22. Next page after 22?

25 MS. SANTILLO: I have a comment on instruction 23. I

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1 don't know if that's skipping ahead. Page 31.

2 THE COURT: That's page 31. Anything before that?

3 All right. Go ahead, Ms. Santillo.

4 MS. SANTILLO: It's just getting back to this issue --
5 and I don't have to make those comments if we're not preserving
6 our rights with respect to this -- but with respect to the
7 false statements and the obstruction of NCUA investigation, I
8 would like clarity that they are only with respect to what was
9 charged in the indictment, depending on the outcome of the
10 briefing.

11 MR. SHIN: Your Honor, I think what Ms. Santillo is
12 proposing in terms of the issues to be resolved, those would be
13 addressed in a limiting instruction to the jury if she were to
14 prevail in her arguments, I think they would be best with
15 addressed by a limiting instruction about what evidence can be
16 considered against who from what period. And this is just
17 stating the law, this instruction, and so I don't see why this
18 needs to be -- I don't see why anything needs to be injected
19 into this instruction, which currently is purely legal.

20 THE COURT: All right. We'll bracket, Ms. Santillo, I
21 guess if you prevail in your motion, you'll ask me to return to
22 this page to see if there is something appropriately that
23 should be added or not. Okay?

24 MS. SANTILLO: Yes. Thank you.

25 THE COURT: All right. But for now, I'm leaving it as

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1 is.

2 Next page. Government's next page is?

3 MS. CHOI: One moment, your Honor.

4 MR. CREIZMAN: My next page would be 38.

5 THE COURT: Anything before 38?

6 MS. CHOI: No, your Honor. I was also looking at 38.

7 THE COURT: Ms. Santillo, anything before 38?

8 MS. SANTILLO: No.

9 (Continued on next page)

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1 THE COURT: Mr. Creizman?

2 MR. CREIZMAN: Yes, your Honor. This is kind of just
3 a little nit, but I think it's important somewhat. On line 9,
4 instead --

5 THE COURT: Let me just pause you. I realize Mr. Lee
6 is here, and I don't want to keep him unnecessarily.

7 Any updates?

8 MR. LEE: Yes, your Honor.

9 THE COURT: Could I ask you to come up to a
10 microphone, Mr. Lee.

11 MR. LEE: Sure.

12 THE COURT: And if you'll just state your appearance.

13 MR. LEE: Yes. Winston Lee, L-e-e.

14 Your Honor, Ms. Santillo provided me the number for
15 Loretta Larkins. I had a fairly comprehensive long
16 conversation with her out in the hallway just now. The
17 substance is this: She informs me that even prior to speaking
18 to me, it was her intention to seek private counsel, and as we
19 speak, she's seeking private counsel. What I made sure to
20 impress upon her was the urgency that the Court is interested
21 in moving forward as quickly as possible, so she should
22 endeavor to do that. I think she referred -- she had some
23 relative, perhaps a cousin, who was an attorney, and she would
24 begin the process to seek to retain counsel.

25 But just so we have as much information as possible, I

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1 did ask her about her resources, her assets. And without going
2 into detail, unless your Honor wants to know, it seems clear to
3 me that she would not qualify based on the assets that she
4 described to me.

5 Now, I have her number, she has my number. I told her
6 I would convey all this information exactly as I've conveyed to
7 you. I told her I would tell the Court this, and then I would
8 ask the Court's direction of what the Court wants me or anyone
9 to do. She did state, also, she wanted to express that she was
10 not here today, she was under the understanding she did not
11 have to be here. I'll leave it at that. She was under the
12 impression she didn't have to be here today, and that's why she
13 was not.

14 Frankly, your Honor, I spoke to her on the phone. I
15 don't know where she is physically, in New York or wherever, I
16 have no idea, I didn't ask her, but she is in the process of
17 seeking counsel, and whatever your Honor wants me to do at this
18 point, I'm at your disposal.

19 THE COURT: All right. Well, I think there may have
20 been some legitimate ambiguity as to whether she needed to be
21 here. So I'm not holding that against anyone. I had thought
22 she would be here, but I can see where the uncertainty arose.

23 I'm hopeful that she'll have consulted with private
24 counsel in time. I think what I would suggest is, Mr. Lee,
25 that I keep you on standby so that in the event of an emergency

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1 that might interfere with the schedule in the case in some way,
2 and out of the interests of justice, I might still ask for your
3 assistance with Ms. Larkins if she doesn't follow through with
4 what she needs to do. But I think -- I'll hear from counsel if
5 anyone disagrees -- it sounds like the path that we're on is
6 that she doesn't qualify for appointed counsel, she understands
7 she's been informed of the urging to retain unconflicted,
8 private counsel for her own protection, and I think that's the
9 most I can do at this point to safeguard this process.

10 Anyone have any additional suggestions or requests?

11 MR. NOBLE: Your Honor, the government agrees with
12 that approach. We would just say that if she does retain
13 private counsel, the government is happy to turn over the 3500
14 material that we have in our possession, so that counsel can
15 review that in advising her about testifying.

16 We would note that there have been issues that have
17 arisen at trial regarding Ms. Larkins and her connections to
18 this case. Again, she was not a former board member. We don't
19 have reason to believe that she participated in the charged
20 conduct, but as Ms. Choi alluded to earlier, there are other
21 issues that have arisen. One is that, as the director of
22 finance for the church, she had some role, we believe, in
23 helping prepare tax information, the W-2s, for instance, for
24 Mr. Gross that were submitted to the IRS, which the government
25 believes were incomplete. Among other things, it omitted his

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1 pastoral support that he allegedly received, some of which was
2 funded by the bribe money, and that was not reported income or
3 not reported to the IRS as potentially taxable income. Another
4 issue is that she told us during an interview that Mr. Gross
5 was paid a 50- or 60-thousand-dollar housing allowance as a
6 clergyperson, which our understanding should have also been
7 reported to the IRS, but was not. We spoke to Mr. Gross'
8 counsel, and it was not reported to the IRS. To the extent
9 Ms. Larkins had some role in preparing the tax information that
10 went to the IRS, she could have exposure there separate from
11 the charges in this case. She was interviewed by the
12 government, we have the notes in the 302. It's possible she
13 was not completely forthcoming with the government in response
14 to some of our questions on these kind of tax matters. We
15 don't know because we just don't know what's in her head
16 completely. That's why we do strongly believe it's important
17 for her to get independent counsel, independent advice, because
18 these are things that she would likely be cross-examined about,
19 should she testify.

20 As Ms. Choi alluded to earlier, in reviewing the loan
21 documents that came up on the cross-examination and direct
22 examination of Meg Flok, it appears that Loretta Larkins also
23 signed a loan that was taken out by the church from the credit
24 union, for which there was basically no underwriting. We
25 haven't thought through all the potential exposure that that

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1 might entail, but her name appears on that as the person who's
2 taking out this loan, for which there's basically no
3 documentation.

4 She also was aware that the church received these
5 payments from the Collectables Club, because she's on kind of
6 like the advisory board of the church, and she did tell us she
7 knew about these payments, and that the church used them, to a
8 certain extent, to help the church. So, obviously, there are a
9 lot of issues out there, is the basic point, that independent
10 counsel should be aware of in advising her about whether she
11 should testify, or whether if she is called, whether she should
12 invoke her Fifth Amendment right not to incriminate herself.

13 MR. LEE: Your Honor, Winston Lee. Although I don't
14 represent her now, this potential I will be advising her, just
15 so I understand the jargon, when the government says without
16 the underwriting, are they saying it wasn't collateralized?
17 I'm not quite sure. So if I have to advise her.

18 MR. NOBLE: Sure. So this was a loan that the church
19 took out from the credit union that Ms. Larkins signed the
20 application, the loan application, for. The only documentation
21 that appears to have been submitted -- this was a loan taken
22 out in, I believe it was, November 2014. The only
23 documentation that was provided was the loan application itself
24 and a statement of a profit and loss from the church for 2013.
25 And we anticipate that the testimony of Terry Adam, from the

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1 NCUA, will be that this was wholly insufficient documentation
2 for this loan, and that it's an insider loan because Pastor
3 Gross is also the pastor of the church who's taking out the
4 loan, and he was involved, as the minutes showed, in the
5 approval of that loan that was extended by the credit union,
6 for which he served as the chairman of the board.

7 So, obviously, that loan posed a conflict of interest.
8 We'd have to suss out where Ms. Larkins kind of fits into that.
9 It's just that's an issue for her attorney to speak with her
10 about. That's something we weren't really -- we were not aware
11 of at the time we interviewed her, so we did not speak with her
12 about that loan issue.

13 THE COURT: Go ahead, Ms. Santillo.

14 MS. SANTILLO: Your Honor, I just am flummoxed by the
15 fact that we are talking about insider loans, things that have
16 never been on the radar as prior bad acts, as any conduct that
17 has been alleged to have any relationship to the bribe in this
18 case.

19 I am renewing my motion about the unfair tactics to
20 try to get defense witnesses not to testify. As of yesterday,
21 she had no criminal exposure, and all of a sudden, they're
22 going through a laundry list of things she did wrong in terms
23 of tax preparation to say she needs advice and might have to
24 invoke her Fifth Amendment right. It is outrageous.

25 THE COURT: I want to understand your specific

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1 application. You had made an argument based on selective
2 immunity previously, which I denied. Is that the argument?

3 MS. SANTILLO: Yes. And I understand that your
4 Honor --

5 THE COURT: So, no one has been immunized, and no
6 nonprosecution agreements have been offered.

7 MS. SANTILLO: That is not the case. There were
8 multiple nonprosecution agreements that were offered in
9 connection with the Coin.mx side of the business. Jennifer
10 Wotherspoon received a nonprosecution agreement. There have
11 been multiple instances where the people on the collectibles
12 side of the club, who were the people who allegedly had any
13 involvement with this Bitcoin exchange, were given
14 nonprosecution agreements. The only people who are being, you
15 know, told that they have exposure and Fifth Amendment concerns
16 that is making them not testify are people who are on the HOPE
17 Credit Union side, who this woman had no knowledge of any of
18 the conduct that is alleged to be illegal in this case, and we
19 were told yesterday that she didn't have any exposure.
20 Suddenly, she's the only witness who is left who is going to be
21 testifying, and she has criminal exposure, too? These are also
22 issues that were never raised as prior bad conduct, in terms of
23 taxes, in terms of insider loans. Like where is that in the
24 indictment? That is irrelevant to this case. Why is the NCUA
25 examiner going to come and testify about insider loans? It has

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1 no bearing on any issue in this case. They are just trying to
2 find little things to try to muddy up the waters here, and in
3 doing so, they are preventing people, who clearly have no
4 intent to commit crimes, from coming to court and telling the
5 truth, and it is -- I'm just sick of it.

6 Earlier this week, they were going to call the Wyatts.
7 This woman is a board member who has no knowledge of the
8 donation, has drafted board minutes. They elicited testimony
9 from a cooperating witness who said that something didn't
10 happen in the minutes, and they're now saying that she has
11 criminal exposure because she, what, maybe doctored the
12 minutes? But they have presented evidence that show
13 contemporaneously that that event of moving the people to the
14 advisory board actually took place.

15 So, this is another example of them coming up with
16 little theories that create exposure to try to intimidate these
17 witnesses from coming to testify.

18 Ms. Wotherspoon stood up, and testified and said, I am
19 Coin.mx, and she got a nonprosecution agreement. And Loretta
20 Larkins did his W-2s, and she has criminal exposure? It is
21 gamesmanship, and I just need to make that record.

22 THE COURT: Mr. Noble.

23 MR. NOBLE: Judge, this is not gamesmanship. We're
24 basically previewing potential lines of cross-examination of
25 Ms. Larkins. She's an insider at the church, she's close to

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1 Pastor Gross. She was involved in the finances of the church.
2 The bribe money, we will show, went into the bank accounts, the
3 operating account, of the church, which Ms. Larkins was in
4 charge of controlling. She came in, we met with her attorney,
5 Cedric Ashley, and she told us that the money, the bribe money,
6 was used to fund church operations, and to the extent Pastor
7 Gross received any personal benefit from it, it was reported --
8 or it was accounted for by the church as so-called back
9 pastoral support. That back pastoral support, which we've
10 calculated is a hundred thousand dollars in the relevant time
11 frame, was never reported to the IRS, and that's clearly
12 income.

13 THE COURT: I get that you're previewing your cross.
14 My only question is why yesterday there was no risk.

15 MR. NOBLE: Well, Judge, I think we made clear she's
16 obviously not involved in -- she was not a board member of the
17 credit union. She was aware of the payments because in her
18 capacity as a church member, as a finance person at the church,
19 so she knew that these payments were made. She didn't know the
20 nature of them. She doesn't have exposure on the Section 215
21 charge, on the bribery charge, because she wasn't involved, she
22 had no fiduciary duty as it related to the credit union.

23 It's similar with respect to false statements and
24 obstruction of the NCUA examination. She wasn't involved with
25 the credit union. What we're saying is -- and these are things

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1 that have been disclosed through 3500 material for the NCUA
2 witnesses -- is that on cross-examination, she's going to be
3 asked some very difficult questions about the church's
4 finances, about loans that were taken out by the church, about
5 the way taxes were reported to the church, and all of this is
6 relevant evidence because it all goes to Mr. Gross' corrupt
7 intent.

8 So, we are trying to preview these lines of cross
9 because we think the government has an ethical obligation to
10 inform her counsel that these issues will arise, she may be
11 cross-examined about them, and she may incriminate herself on
12 these issues. Even if they don't go to the heart of the
13 charges in this case, it's still relevant as to her credibility
14 as a witness.

15 So it's not gamesmanship. I think we have a duty to
16 disclose this and be up front that these are issues that may
17 arise, we can foresee in her testimony, because the last thing
18 we want is for her to testify on direct, and then we cross her,
19 and these issues come up, and she invokes her Fifth Amendment
20 right not to incriminate herself, because then it's a potential
21 mistrial.

22 THE COURT: Ms. Santillo, I take it you're not saying
23 that these areas are inappropriate for cross-examination?

24 MS. SANTILLO: I think they're completely irrelevant
25 to the case, and we haven't had notice of them. Taxes and

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1 insider loans are not part of this case.

2 MR. NOBLE: She cross-examined on the insider loans.

3 MS. SANTILLO: That's because Ms. Flok brought it up.

4 THE COURT: So they're part of the case.

5 MS. SANTILLO: Well, I don't think --

6 THE COURT: The question is whether, in light of
7 the -- maybe I need a proffer as to what Ms. Larkins' testimony
8 will go to, because I don't know.

9 MS. SANTILLO: She is the bookkeeper for the church,
10 so the money comes into the church, and she is responsible for
11 allocating it. She would just say how she managed the internal
12 books because the government is going to say that, you know,
13 money went to Pastor Gross, and she actually allocated money to
14 his personal account. So if there was an expense, she would
15 charge it against his personal account. So that's the nature
16 of it, for the most part.

17 THE COURT: So her testimony will be --

18 MS. SANTILLO: Just about how when the money comes
19 into the church, if there is anything that is spent -- so, for
20 example, a credit card, if there's anything spent personally
21 for Pastor Gross rather than having it actually be something
22 that he gets, it's charged against his personal account.

23 THE COURT: Can you give me an example?

24 MS. SANTILLO: Okay. So if -- she keeps track --
25 okay, I'll say it. So sometimes -- the church doesn't have a

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1 credit card in its own name, so there are some expenses that
2 are allocated towards the church and some that are allocated
3 towards him personally. And what she does is she says, okay,
4 that's a church expense, the church will cover it. Okay,
5 that's a personal expense, you'll cover it.

6 THE COURT: And what's the relevance of that?

7 MS. SANTILLO: Because there is confusion in the
8 record about something that was on Pastor Gross' personal
9 account. It says in the indictment that he used money from the
10 bribe to be spent on his personal expenses, and she is the one
11 who said, no, that's actually church expense.

12 THE COURT: I think the only specific example we've
13 seen so far of that -- tell me if I'm wrong -- is the massage
14 charge?

15 MR. NOBLE: Yes. And there's going to be more of that
16 because the tracing analysis that our summary witness will
17 testify that he performed will show that some of the bribe
18 money flowed through to pay the credit card of Mr. Gross, which
19 was paid out of the church operating account. And some of that
20 money went to pay expenses that had been charged on the card,
21 one of which was another massage, which is clearly a personal
22 expense. But there are other examples of personal expenses
23 charged to that credit card that the church paid out of the
24 operating account using the funds that came from the
25 Collectables Club.

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1 So, this is the whole purpose of the tracing analysis,
2 is it shows that at least some of the money, the \$150,000, that
3 flowed into the church's operating account went to pay personal
4 expenses of Pastor Gross.

5 I think the testimony of Ms. Larkins is going to say,
6 no -- well, I don't know exactly what it's going to be, but
7 some of those personal expenses were actually church expenses.
8 I don't know how they're going to say a massage was a church
9 expense. And we have other examples that appear to be clearly
10 personal in nature. So maybe she's going to say that. But our
11 understanding is, having spoken with her, when we confronted
12 her with these issues is she said, okay, yes, some of these
13 expenses on the credit card were for the church, some of these
14 expenses were clearly for Pastor Gross, but to the extent they
15 were personal expenses, it was back salary essentially, back,
16 quote-unquote, pastoral support that church members had donated
17 to the church that Pastor Gross was owed. And so then the
18 question is, okay, if that's back pastoral support, back salary
19 that Pastor Gross was owed, why wasn't it reported on his W-2
20 to the IRS? And that's the relevance of the tax evidence, the
21 tax records that we're going to be putting in, because Pastor
22 Gross, to the extent he received personal benefit from the
23 Collectables Club bribe money, Kapcharge bribe money, why
24 didn't he report it to the IRS? That shows -- it's classic
25 consciousness-of-guilt evidence that you don't report to the

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1 IRS your criminal proceeds. So that's why this is all
2 relevant.

3 But to the extent Ms. Larkins was the bookkeeper, was
4 involved in preparing forms that were sent to the IRS, and knew
5 that Pastor Gross was receiving this back pastoral support,
6 that the church was paying his personal expenses, that's income
7 that she should have reported to the IRS on the W-2. Not to
8 mention the housing allowance that should have been reported to
9 the IRS, but was not, which, again, she seemingly was
10 responsible for reporting since she knew about it, and she was
11 the one involved in preparing the tax forms.

12 Now, we haven't spoken to her, so we don't know if she
13 has an explanation on all these particular issues. She might.
14 She may have a perfectly good explanation for them. We are
15 just raising these, so that we're not doing it in the middle of
16 her testimony.

17 THE COURT: Okay. Well, there's just simply no basis
18 to conclude that the government is engaging in any kind of
19 outrageous conduct here. There are people who are involved in
20 an issue -- involved, and present, and participants in this
21 matter at every level. Now, the government did immunize, give
22 a nonprosecution agreement to, Jennifer Wotherspoon to get her
23 testimony, and you can look and say, well, why Ms. Wotherspoon,
24 but not everyone involved with the board. But that's the mode
25 of analysis. The government has proffered a legitimate basis

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1 of cross-examination in light of the testimony that you've
2 indicated you'll elicit from Ms. Larkins, which seems relevant.
3 It's not exactly clear to me where it goes, but it seems
4 relevant.

5 To the extent that the government has legitimate
6 avenues of cross-examination to follow with respect to that,
7 all that the Court can do is ensure that, both for her sake and
8 for the preservation of this trial process, is that she has
9 independent counsel that is advising her. I'm not sure what
10 else can be done.

11 To the extent that the application that's being made
12 is -- is what, Ms. Santillo? What exactly is the application
13 that's being made?

14 MS. SANTILLO: Well, as I understood your Honor's
15 ruling with respect to what we said about tactical advantage,
16 one of the things that was suggested on the record was that it
17 was kind of a moot point because the government strategically
18 chose not to call the witnesses in their case, and they hadn't
19 immunized anybody. I just want to make clear that our position
20 is that they have chosen not to prosecute certain people in
21 this case when it has benefited their case, and they are -- I
22 think they've progressively changed their position about
23 whether these witnesses have criminal exposure depending on
24 whether it was to their strategic advantage.

25 As of earlier last week -- or earlier this week, the

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1 Wyatts were their witnesses. After they met with Ms. Larkins,
2 they said we're calling her as our witness. And repeatedly,
3 they've said things like that, and then as soon as --

4 THE COURT: I don't understand that last point. After
5 they met with Ms. Larkins, they said they're calling her?

6 MS. SANTILLO: I had a call with the government, and
7 they said we're going to call her as our witness.

8 THE COURT: Ms. Larkins?

9 MS. SANTILLO: Yes.

10 THE COURT: Okay.

11 MS. SANTILLO: And then five members of the board, as
12 of when we started this trial, were going to be testifying, but
13 suddenly, now they all have criminal exposure, so they can't
14 testify in Mr. Gross' behalf. So I am just making my record
15 because I think that --

16 THE COURT: You can make your record, and I welcome
17 the record. I am still asking what your specific application
18 is because you have not answered.

19 MS. SANTILLO: I'm renewing my motion.

20 THE COURT: For what?

21 MS. SANTILLO: For immunity for these witnesses.

22 THE COURT: For Ms. Larkins?

23 MS. SANTILLO: For Ms. Larkins, and for Charles Blue,
24 and the other board members.

25 THE COURT: Okay.

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1 Anything else, Mr. Noble?

2 MR. NOBLE: No. We would oppose that application,
3 obviously.

4 THE COURT: That application is denied, for the
5 reasons that I have indicated on the record today and
6 previously. Certainly, Charles Blue, as an example, I can see
7 all kinds of reasons that -- based on the evidence that's
8 developed, as to why the government would not call Mr. Blue. I
9 can't, absent a very, very high standard force -- of
10 misconduct, and gamesmanship, and the like, force the conduct
11 to immunize witnesses.

12 So, for the reasons I've already indicated, and in
13 light of the discussion today, that application is denied. I
14 do think the government -- they're preparing their
15 cross-examination for the person who now has indicated they're
16 a potential witness, and they have previewed legitimate bases
17 for that cross-examination, and that is what it is. I don't
18 see any other way to understand it.

19 So, I think, to move on then, given that that is the
20 specific application, and it is denied, moving forward, I
21 think, Mr. Lee, just because you're still here, I think what I
22 would request, whatever is necessary in terms of a court order
23 for compensation of your time, even though there's not a
24 specific appointment, I'm happy to do. I think it would
25 benefit this process to keep you sort of as someone who can

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1 maybe check in with Mrs. Larkins later to see if she has
2 retained counsel and to facilitate whatever information that
3 attorney might need to consult with her. That would be my
4 request to you.

5 MR. LEE: Your Honor, if private counsel comes into
6 the case, what would be the best way to notify the Court that
7 that is expected? I don't know who counsel is, how
8 knowledgeable they are about how to file, et cetera, but it may
9 be over the weekend, and I'd be willing to notify the Court.
10 How do you suggest I notify the Court, by email to your
11 chambers? Whatever your Honor suggests.

12 THE COURT: I think if you email to chambers, with a
13 copy to the government and the defense counsel --

14 MR. LEE: Certainly.

15 THE COURT: -- so everybody is aware.

16 MR. LEE: I will certainly make sure I have good
17 contact information for the government. I'll notify them, and
18 I am sure they will help me make sure the Court is aware of the
19 current situation, posture of this.

20 THE COURT: Okay.

21 MR. LEE: Thank you, your Honor.

22 THE COURT: I appreciate it, Mr. Lee.

23 MR. LEE: Thank you, your Honor.

24 THE COURT: Even though it isn't anticipated, as I
25 say, that Ms. Larkins will be eligible, I think out of the

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1 interests of justice and protection of this process, I will ask
2 for your continued assistance until we get through this
3 transition moment, and certainly we'll sign whatever order or
4 papers you need for your compensation for that effort.

5 MR. LEE: Thank you, your Honor. You have my -- I'm
6 on standby, I'm ready. You have that, your Honor.

7 THE COURT: Thank you, Mr. Lee. I appreciate that.
8 Anything else on that?

9 Back to the charge. We were at page 38.

10 MS. MADRIGAL: Yes, your Honor. We have a proposal.

11 THE COURT: Go ahead.

12 MS. MADRIGAL: It relates to lines 8 through 11. It
13 would actually just be removing on line 9 "a member of the
14 conspiracy" and changing it for different language. I can read
15 that sentence as we propose it.

16 THE COURT: Go ahead.

17 MS. MADRIGAL: "If you find beyond a reasonable doubt,
18 that the specific defendant you are considering knowingly and
19 willingly participated in the conspiracy charged in the
20 indictment, then any acts done or statements made in
21 furtherance of the conspiracy by persons also..." the remainder
22 of the sentence stays the same.

23 THE COURT: So it's adding that "knowingly and
24 willingly participated in the conspiracy"?

25 MS. MADRIGAL: Yes, your Honor.

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1 THE COURT: Ms. Choi?

2 MS. CHOI: Your Honor, I think we're fine in
3 principle, but I think it's not willingly, I think it's
4 willfully. As long as it's knowingly and willfully
5 participated, we don't have a problem with that.

6 MS. MADRIGAL: That's acceptable.

7 THE COURT: Ms. Santillo?

8 MS. SANTILLO: No objection.

9 THE COURT: All right. So the change will be that the
10 sentence that's now line 8, on page 38, would read, "If you
11 find beyond a reasonable doubt that the specific defendant you
12 are considering knowingly and willfully participated in the
13 conspiracy charged in the indictment..." the rest remains the
14 same?

15 MS. MADRIGAL: Correct.

16 THE COURT: All right.

17 Next page?

18 MS. CHOI: Yes, your Honor. Again, just for clarity
19 of the record, that we reserve on instruction 27 pending
20 further briefing.

21 THE COURT: Yes.

22 MR. SHIN: Your Honor, just I alluded to this charge
23 earlier as one of the topics we plan to address.

24 THE COURT: No, I understand. And you said you would
25 brief both the contention that it ought not be given at all,

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1 and if I were to disagree with you on specific --

2 MR. SHIN: We would propose line edits. I can offer
3 you a preview, although it would be better written out, but I
4 think there is certain additional language that would make the
5 point that the withdrawal needs to be complete, that further
6 acts in support of the conspiracy after the purported
7 withdrawal -- I'm not saying it as eloquently as the Second
8 Circuit wrote it.

9 THE COURT: Well, let's just wait, and you can make
10 your proposal.

11 MR. SHIN: Exactly. So we'll include it, and we'll
12 also include our case support for the proposed language as
13 well. Thank you.

14 THE COURT: I'll just say, I have difficulty seeing
15 how I wouldn't give this instruction, given what the defense
16 is. I get that these are interrelated issues, and you're going
17 to brief it. I get that you think the evidence is on your side
18 on this, but it seems to me this is a quintessential fact
19 question for the government to carry its burden and for the
20 jury to consider in light of the defenses being made.

21 MR. SHIN: Understood, your Honor. We'll obviously
22 take that into account and brief it accordingly.

23 THE COURT: Thank you.

24 Next page?

25 Go ahead, Ms. Madrigal.

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1 MS. MADRIGAL: Page 53, your Honor, instruction number
2 37, "Conscious Avoidance."

3 THE COURT: Anything before 53? No?

4 MR. NOBLE: No.

5 THE COURT: Go ahead.

6 MS. MADRIGAL: We don't believe that the government
7 has laid any factual predicate for the assertion that Yuri
8 Lebedev deliberately closed his eyes in this case.

9 MS. SANTILLO: We have the same objection.

10 THE COURT: So the defense's request is to not include
11 the instruction?

12 MS. MADRIGAL: That's correct, your Honor.

13 THE COURT: Go ahead, Ms. Choi.

14 MS. CHOI: Your Honor, I think there has already been
15 discussion that the defense, in their lines of cross, are
16 attempting to establish that, for example, with regard to the
17 lawyers, that Mr. Lebedev clearly could not have been on notice
18 of what was going on because Mr. Murgio had alluded to the fact
19 that there were lawyers involved in some of the aspects of the
20 charged conduct. I think that is going to be the crux of both
21 of the defendants' cases, that there were certain acts that
22 gave them comfort, so that they could go on with participating
23 in these corrupt acts and in this conspiracy. Under those
24 circumstances, because that's -- because your Honor has allowed
25 that line -- even though we think that, as a matter of

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1 affirmative defense of advice of counsel, it doesn't apply,
2 your Honor has allowed them to go down that route, and I think,
3 given that factual situation, this instruction is necessary, so
4 that the jurors understand that you can't simply assume at some
5 point that the defendants aren't culpable simply because they
6 turned a blind eye to all the other evidence. For example, in
7 the case of the lawyer situation, that Mr. Murgio was telling
8 Mr. Lebedev and others if they were going to lie to certain
9 lawyers about certain aspects of what was going on and not tell
10 them about, for example, the fact that there were bribes. All
11 of them knew, obviously, that the bribes were problematic from
12 a legal perspective. The fact that there was even this debate
13 between Jose Freundt and Mr. Murgio that Mr. Lebedev was
14 witness to on those group chats on WhatsApp is all the reason
15 why we need to have the conscious avoidance charge here because
16 that will be their closing argument, that Mr. Lebedev relied on
17 Mr. Murgio, being a good friend of his, and engaging these
18 other individuals for advice. When the evidence is to the
19 contrary about what precisely Mr. Lebedev knew, and they're
20 making these arguments of conscious avoidance, instruction is
21 not only necessary, but required. I guess they're both
22 necessary and required.

23 And the same with regard to Mr. Gross. He alludes to,
24 in cross-examination, that he never knew the true nature of the
25 Collectables Club, that he was never told. Well, there are

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1 emails that show they're openly talking about the virtual
2 currency issue that we will rely on. And there was testimony
3 with regard to Rico Hill that he had not hid that fact from
4 Mr. Gross, that he had worked at Coin.mx, he understood what
5 Coin.mx -- and that it was his view that Mr. Gross understood
6 what Coin.mx was because he didn't seem shocked when they were
7 having these conversations.

8 So I think, given those two circumstances -- and,
9 sorry, one other example is just sort of the idea that
10 Mr. Murgio was changing plans midstream, but no one really
11 understood what the nature of the deal was -- the conscious
12 avoidance charge is necessary.

13 THE COURT: Ms. Madrigal, why isn't what the
14 government just proffered reason in the evidence to give this
15 charge?

16 MS. MADRIGAL: Your Honor, there has been no testimony
17 or line of cross-examination where we imply that Mr. Lebedev
18 relied on Mr. Murgio because they were friends, and they had
19 this kind of established relationship. At least on behalf of
20 Mr. Lebedev, that has not been the line of cross-examination.
21 We have not called that into question.

22 In terms of the advice of counsel or any type of
23 reliance on counsel, that goes to Mr. Lebedev's good faith.
24 It's not that he deliberately closed his eyes because there
25 were lawyers involved, it's that he believed that -- this was

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1 just one factor out of many that he looked at in his
2 relationship with Mr. Murgio.

3 I still don't believe, even based on what the
4 government just said, that there is any predicate that he
5 actually closed his eyes to what was happening. In fact, the
6 evidence has been to the contrary, that he was involved in a
7 lot of aspects, that he knew what was going on. It just seems
8 inconsistent with the evidence that the government has
9 presented to far.

10 THE COURT: It doesn't seem inconsistent with how
11 Mr. Creizman opened, though.

12 MS. MADRIGAL: I'm sorry?

13 THE COURT: It doesn't seem inconsistent with how
14 Mr. Creizman opened, the arguments that were made in opening.
15 I would think it would be anticipated in closing, both with
16 respect to -- I think what I hear you saying is they go to good
17 faith, it goes to good faith, and the government's saying, no,
18 it goes to conscious avoidance. And my resolution is to give
19 both charges because --

20 MS. MADRIGAL: Understood. That's fair.

21 THE COURT: Which is what I've suggested.

22 Ms. Santillo, did you want to say anything in response
23 to the government or just renew --

24 MS. SANTILLO: Yes. With respect to the factual
25 predicate in our case, knowledge of Coin.mx generally and

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1 virtual currency generally doesn't mean that there has been a
2 single drop of evidence that has been presented that Mr. Gross
3 was aware of anything that was unlawful about the workings of
4 Coin.mx. There are certain things that have been alleged in
5 terms of whether it was properly licensed, whether or not
6 they're defrauding the banks, whether they filed false
7 paperwork with the banks, and those are the things that make it
8 unlawful. There's not been a shred of evidence that he would
9 have had any knowledge of that, and that he turned a blind eye
10 to that.

11 MS. CHOI: Right. Your Honor, two points on that:
12 One is, they opened on the notion that Mr. Murgio changed the
13 deal -- the complexion of the deal at hand, and that he didn't
14 understand that Mr. Murgio basically took him for a ride, he
15 didn't understand what was going to end up happening.
16 Obviously, the evidence, all the red flags that have been
17 raised -- that were raised over the course of the ACH
18 processing, and even Mr. Gross' own admissions show that that's
19 clearly contrary to the evidence. But to the extent that they
20 are going to argue that Mr. Murgio was hiding certain facts
21 about the quantity of -- the volume of the ACH, or who
22 Kapcharge was, or the nature of the relationship for Mr. Gross,
23 this is obviously a necessary charge on that front because
24 there are only so many times that you can turn a blind eye, and
25 they opened on the theory that there was a good-faith basis for

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1 Mr. Gross to be operating under these conditions and continuing
2 forward in the ACH processing relationship with Kapcharge. So
3 I think that in and of itself is problematic.

4 And second of all, if you recall, there was an email,
5 I believe, dated December 2nd or 3rd where Ms. Flok had asked
6 Mr. Gross what the Collectables Club was, and he gave --
7 knowing full well that there were these field of membership
8 issues that had arisen with regard to Collectables Club, gave
9 a, I think, evasive -- at best, evasive -- answer about what
10 the nature of that company was and what they were doing those
11 transactions for. He said it was for payroll, which he knew
12 was not the case. So, again, if the answer is -- if the idea
13 is, well, we just relied on Anthony Murgio, this guy who was a
14 hustler that swindled us all, the conscious avoidance
15 instruction is necessary.

16 MS. SANTILLO: I take strong issue with that in terms
17 of what the defense would be with respect to ACH processing.
18 We're not talking about -- that's not the charge. I mean, it
19 goes back to that fundamental issue. A lot of ACH processing
20 has never been what he's charged with, it's with taking a
21 corrupt payment to turn over control of the board.

22 THE COURT: Right. Yes, I understand.

23 Go ahead. I don't mean to interrupt you.

24 MS. SANTILLO: I just don't see any factual predicate
25 they've laid with respect to his knowledge of anything unlawful

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1 in that regard that he turned a blind eye to.

2 THE COURT: These are clearly factual questions that
3 are to go to the jury. The evidence is sufficient to give both
4 the conscious avoidance and the good-faith instruction. So I
5 overrule those objections.

6 Go ahead.

7 (Continued on next page)

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1 MR. NOBLE: Judge, this may be a losing battle in
2 light of the Court's statements right now.

3 THE COURT: Save your breath.

4 MR. NOBLE: The government objects to the good faith
5 instruction as unnecessary. And just to point the Court to law
6 to support that position, United States versus McElroy, 910
7 F.2d 1016 2d Cir. 1990, which was a Section 215 bribery case
8 where the district court did not include the good faith
9 instruction, and the Second Circuit upheld that decision saying
10 that, "As long as the Court properly instructs the jury as to
11 the knowledge and intent elements that are required to convict
12 the defendants, then there's no need for a good faith defense
13 instruction." And the Second Circuit observed later on in
14 2003, it's an unreported case, but it's United States versus Al
15 Morshed, 69 Fed.App'x 13, and this is at page 16, that the
16 Second Circuit, "has long adhered to the view held by a
17 majority of the circuits that a district court is not required
18 to give a separate good faith defense instruction provided it
19 properly instructs the jury on the government's burden to prove
20 the elements of knowledge and intent because, in so doing, it
21 necessarily captures the essence of a good faith defense,"
22 again citing back to McElroy.

23 So we just note our legal objection to the good faith
24 charge as being unnecessary, and we believe it's in line with
25 the Second Circuit precedent.

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1 THE COURT: I couldn't tell from your opening papers
2 whether it was a disagreement to the standalone charge as
3 opposed to wanting it incorporated into the other, into the
4 specific charges. I do, for the reasons I've said, I think the
5 sort of flip sides of the coin here and the core of the
6 defense, and in some level the crux of the prosecution, is
7 whether this was good faith and whether this was conscious
8 avoidance, and so as I have in previous cases, the balance, I
9 think, appropriate is to give both.

10 MR. NOBLE: Understood.

11 THE COURT: All right.

12 MR. NOBLE: Thank you, Judge.

13 THE COURT: Thank you.

14 Next.

15 MR. SHIN: Your Honor, I believe the next instruction
16 at issue is instruction 40, which is on venue, which is on
17 page 58.

18 MS. MADRIGAL: We actually have something before that,
19 instruction 39, aiding and abetting on page 56. We would
20 propose keeping the first sentence, lines 1 through four, but
21 then eliminating the remainder of line 4 through 11. We think
22 the rest of this paragraph is unnecessary.

23 MR. NOBLE: Ms. Madrigal, which lines would you
24 delete?

25 MS. MADRIGAL: We would just remove line 4, beginning

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1 "as to each of those accounts" through line 11.

2 THE COURT: Mr. Noble?

3 MR. NOBLE: I'll take this one. Your Honor, I think
4 it is necessary to make clear that either theory is --
5 liability is sufficient to convict, and I think the instruction
6 is legally correct, so we would object to the removal of that
7 language.

8 THE COURT: I'm just trying to look back at my notes.
9 I think this is a standard aiding and abetting charge, or at
10 least it was what was jointly --

11 MR. NOBLE: This was what was jointly submitted. And
12 I believe we took this from a Judge Sullivan charge that Judge
13 Sullivan gave.

14 THE COURT: I'm going to read the charge to myself
15 without that language. Just a moment.

16 (Pause)

17 THE COURT: Ms. Madrigal, what's the concern?

18 MS. MADRIGAL: I just believe it's repetitive, your
19 Honor. I think, to address Mr. Noble's concern, maybe leaving
20 in lines 4 through the beginning of line 7. It's just, again,
21 then line 7 through 11 are just repeating lines 4 through 7.

22 THE COURT: So the renewed proposal would be delete
23 lines 7 through 11?

24 MR. NOBLE: I think that's an acceptable compromise.
25 It is a bit repetitive.

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1 THE COURT: Ms. Santillo, any objection to eliminating
2 lines 7 through 11?

3 MS. SANTILLO: No.

4 THE COURT: All right, so we'll do that.

5 MS. MADRIGAL: Thank you, your Honor.

6 THE COURT: Thank you.

7 Next. Anything before venue?

8 MR. SHIN: I believe venue is the next instruction,
9 your Honor.

10 THE COURT: You submitted something on this last
11 night. What page was venue?

12 MR. SHIN: 58, your Honor.

13 THE COURT: Go ahead, Mr. Shin.

14 MR. SHIN: We laid this out in detail in our
15 submission, your Honor, but there are three sets of changes.
16 The first is just to make -- when examples are given of
17 communications, wires, emails, to make those singular, and we
18 believe that's consistent with your Honor's ruling in the
19 Parrilla case, which in turn relied on the Rommy case. And as
20 your Honor is aware, that was about a single call or text being
21 sufficient for venue. And so we propose some edits in the red
22 line that we included in our submission just to make those
23 singular.

24 It also keeps reference to the singular consistent
25 with the word "act", which is used in singular throughout the

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1 rest of the charge, so that's one group of edits.

2 THE COURT: Let's pause there. On that point, I'll
3 hear from defense counsel.

4 MS. SANTILLO: Your Honor, we got this submission last
5 night. I would like an opportunity to research these issues in
6 terms of responding. I anticipate objections definitely to the
7 substantive part on the bottom, and I don't have a definitive
8 position yet on that particular question.

9 THE COURT: Well, we need to narrow as much as we can,
10 and this is just a reaction to my proposed charge and so the
11 specific request is --

12 MR. SHIN: Right. So starting on page 58, your Honor,
13 there are edits to the second half of that last paragraph. So
14 starting --

15 THE COURT: Okay. I see Ms. Santillo's point, which
16 is that this ties into the later substantive point, which is to
17 add additional examples, I suppose, so maybe we'll pause for
18 the moment.

19 Your first point is just that you want to --

20 MR. SHIN: Make things singular.

21 THE COURT: -- make singular when examples are used,
22 emails --

23 MR. SHIN: Communications, wires --

24 THE COURT: -- communications -- you way to say "a
25 wire", "an email" --

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1 MR. SHIN: Correct, your Honor.

2 THE COURT: Let's bracket that for the moment.

3 MR. SHIN: That's the first one.

4 The second one was at the end of the paragraph on
5 page 58, starting at line 18, your Honor. So the email example
6 is given from 18 through 22. And I actually think our proposal
7 on this one is defendant favorable. I just wanted to make
8 clear that reasonable foreseeability applies to each of the two
9 scenarios laid out there because there's currently only a
10 reference to knowledge right at the end of that paragraph.

11 And so my proposal, which I've included in track
12 changes in our submission, would simply include the "known or
13 reasonably foreseeable" language from the cases to both
14 scenarios in that sentence. In other words, the two scenarios
15 are one when the defendant or conspirator is in the district
16 when they send or receive an email, and the second scenario is
17 when a defendant or conspirator is outside of the district and
18 sending or receiving an email into the district. The purpose
19 is just to make clear that knowledge or reasonable
20 foreseeability applies to both scenarios so that the jury
21 doesn't elied that requirement.

22 THE COURT REPORTER: Doesn't?

23 MR. SHIN: Doesn't --

24 MS. CHOI: Elied.

25 MR. SHIN: Skip that part. I'm not sure if I used the

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1 word right, which is why --

2 MS. CHOI: No, but that's what he said.

3 THE COURT: Okay.

4 MS. MADRIGAL: We have no problem with that, your
5 Honor.

6 THE COURT: Okay. With the same bracketed concern?

7 MS. SANTILLO: I just plan to research the venue
8 issues, and I just want to -- it seems fine to me right now.
9 So I just -- I want to go back to the cases.

10 THE COURT: Yes. I can tell you you're not going to
11 find much. What there is is Parrillo, which is up on appeal.

12 MR. SHIN: Then the third -- the most substantive
13 change that we requested, it's actually a supplement, is, given
14 the evidence that's come into the case, your Honor, regarding
15 wire transactions, we've proposed that that be given as an
16 example, so we've proposed a paragraph describing how a
17 financial transaction, including a wire transfer, can establish
18 venue, and we've also proposed some language in that paragraph
19 regarding what the jury can consider in determining whether
20 such a transaction is reasonably foreseeable in terms of its
21 connection to the district.

22 And we've cited in our submission the cases which are
23 clear. The Second Circuit cases which clearly say, one, that a
24 wire transfer can establish venue, and two, that reasonable
25 foreseeability can include the consideration of the defendant's

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1 savvy, so savvy as an investor or savvy in business, as well as
2 considering whether the defendant has actually seen a document
3 indicating that the transaction passed through the district.
4 And we've cited the Ohle case and the Svaboda case in our
5 papers. I understand that Ms. Santillo would like to research
6 and respond to that.

7 THE COURT: Go ahead, Ms. Santillo.

8 MS. SANTILLO: My concern is in some part related to
9 these issues with respect to what this conspiracy is and what
10 the essential conduct is. Because they are talking about
11 evidence that they focused in on with respect to processing ACH
12 transactions with Kapcharge as establishing venue for this
13 conspiracy -- or I don't know if it's to the bribe as well --
14 but I take issue with that in terms of emphasizing that in a
15 jury instruction when I think it's not even properly a
16 consideration for what the essential elements of the conduct
17 are. So that's one concern.

18 The other concern is the conflation of cases that
19 address things like wire fraud where the wire is the essential
20 nature of the conduct. And in this case, we have a bribe
21 conspiracy case, and I want to make sure that it's crystal
22 clear to the jury that when they're considering the essential
23 conduct elements of bribery versus conspiracy -- or wire fraud,
24 that they're not, you know, getting an erroneous instruction to
25 suggest that a wire automatically gives venue.

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1 MR. SHIN: Your Honor.

2 THE COURT: Yes. I'll tell you my concern when I read
3 this suggestion was kind of like my reaction to whether to do
4 more in the summary, which is, there are examples in my
5 proposal which were what was used in Parrillo. I don't know of
6 other examples of cases where those sort of examples were used.
7 Now, it's true, it's the law that got crafted in a compromised
8 situation specific to that case. When I read your proposal for
9 an addition, I thought, well, this is too much. This is the
10 government kind of putting its theory of venue into the
11 instruction, which is not something one would typically do.

12 My feeling, and I think this actually would eliminate
13 all of these issues, would be to -- with certainty as to the
14 reasonable foreseeability language, which I think everyone
15 agrees is appropriately included -- would be to extract all of
16 the examples and just make it a generic charge that's right on
17 the law and then you make your arguments as to venue. That was
18 my feeling when I read it. I got concerned that a specific
19 compromise that got crafted in a different context was starting
20 to bleed into something that, especially with the additional
21 examples which I think are in issue here, starts to bleed into
22 sort of the government's case of venue being made in the
23 instruction inappropriately.

24 MR. SHIN: Your Honor, that sounds fine to the
25 government. The only request we would make is that, to the

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1 extent the Court were to strip out language from its existing
2 proposal, we would have a chance to look at it and respond to
3 that.

4 THE COURT: Sure. We worked on this this morning a
5 little bit. I think you're going to want to look at it. But
6 I'll read it to you. The first paragraph is the same. The
7 second paragraph is the same. And then the third paragraph is
8 shortened as follows -- and you can see what I would do
9 similarly for the last paragraph -- but the third paragraph
10 would read, "As to the conspiracy charges, the government need
11 not prove that any crime was completed in this district or that
12 the defendants or any of their coconspirators were physically
13 present here, rather, venue is proper in this district if any
14 of the defendants or their coconspirators caused any act or
15 event to occur in this district in furtherance of the offense,
16 and it was reasonably foreseeable to the defendant that you are
17 specifically considering that the act would take place in the
18 Southern District of New York." A much more standard venue
19 instruction, though it incorporates reasonable foreseeability,
20 which I think the law allows, and then a comparable truncated
21 instruction on the substantive accounts, and then you can make
22 your arguments that the evidence meets the standard, they can
23 make their arguments as to the evidence not meeting the
24 standard, and appropriately the jury decides.

25 MR. SHIN: That sounds reasonable to the government,

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1 your Honor.

2 MS. SANTILLO: That sounds good. Thank you.

3 THE COURT: Ms. Madrigal?

4 MS. MADRIGAL: We would agree with the Court's
5 proposed instruction.

6 THE COURT: I'll let you take a look at the specifics.
7 I think that then eliminates points one and two.

8 MR. SHIN: I think it does, your Honor. And even
9 though I put in -- we put in a submission with three points,
10 there was one additional -- this is very minor -- this is very
11 minor, your Honor.

12 So there's a reference here in the first paragraph --

13 THE COURT: Let me pause and give my law clerk an
14 instruction.

15 (Pause)

16 THE COURT: Mr. Rosen is going to email you basically
17 what I just read. I just want to -- maybe you, like me, like
18 to look at things written down, so I'll give everybody another
19 chance to look at that. But I think both that it's right, it's
20 not repeating what any -- as with any jury instruction, there
21 is compromise specific to a case, and I think this is a better
22 charge, and your request for an additional example has helped
23 me see why.

24 MR. SHIN: Understood, your Honor.

25 THE COURT: Go ahead.

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1 MR. SHIN: It's a very minor point. In the first
2 paragraph, in lines 4 through 6, the charge gives a list of the
3 counties in the Southern District.

4 THE COURT: Yes.

5 MR. SHIN: As your Honor has already seen, much of our
6 evidence of venue relies on contacts, on acts, overt acts,
7 what's the connection to Manhattan, which the jury will
8 obviously know is in New York County.

9 We are planning to introduce, however, some documents
10 next week that establish overt acts with the connection to
11 Garrison, New York, which is in Putnam County, and Garrison,
12 which we expect many members of the jury may not be familiar
13 with, so we would request an instruction here simply stating
14 it's a fact -- I don't think there's any dispute -- that
15 Garrison, New York, is in Putnam County.

16 I haven't had a chance to discuss this with defense
17 counsel, but -- and because these are documents that we're
18 presenting, there's no specific witness from whom we would
19 elicit that testimony that Garrison is in Putnam County, unless
20 we were required to put on a summary witness for that specific
21 fact.

22 MS. SANTILLO: Was this the list of things that we
23 were informed would be the basis for venue?

24 MS. CHOI: It's not for you.

25 MS. SANTILLO: Okay.

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1 MS. CHOI: It's for Lebedev.

2 MR. SHIN: This is Tensor 2D, Melissa.

3 MS. MADRIGAL: Great.

4 MS. CHOI: Tensor 2D is headquartered in Garrison,
5 New York.

6 MS. MADRIGAL: The one issue with that is it just
7 singles out --

8 THE COURT: For the same reason I don't want to --
9 why don't you work out a stipulation that Garrison is in
10 Putnam, and then you can tell the jury in your closing.

11 MR. SHIN: Thank you. Understood, your Honor. Thank
12 you very much.

13 MS. CHOI: On the question of the venue notice, I just
14 wanted to update your Honor. So we followed your Honor's
15 instruction last week, we're still going through the evidence,
16 I've already informed defense counsel that we will be providing
17 them a list with the remaining government's exhibits that we
18 seek to introduce, one long list this weekend so that we can
19 just try to get it all in without having to do what we've --
20 you know -- the negotiations sort of seriatim in interest of
21 making sure that things are efficient. And that as we noted
22 there, we reserve our right to add venue points and to narrow
23 the scope of what we argue with regard to venue either way.

24 THE COURT: What's next? Ms. Madrigal?

25 MS. MADRIGAL: Instruction number 46 on page 68,

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1 defendant's right not to testify. And this might be a bit
2 premature at this point, but we have a concern with maybe one
3 defendant testifying and the other one not testifying, so I'm
4 not sure whether the Court would like to address this now.

5 THE COURT: I think that we should plan for that
6 eventuality. Do you have a proposal for that possibility?

7 MS. MADRIGAL: We have a proposal in the event that
8 Mr. Gross testifies and Mr. Lebedev does not testify.

9 THE COURT: Okay.

10 MS. MADRIGAL: It would be to add -- I mean, I guess
11 we would have to change line 3, as well, but our proposal would
12 be to add, in line 9, after "witness stand", we would add the
13 following sentence: "In addition, even if one defendant
14 testifies, no adverse inference may be considered against the
15 other defendant who did not testify."

16 MS. CHOI: That's fine, your Honor.

17 THE COURT: And I want to hear from Ms. Santillo, but
18 that could be used if -- so we're only giving this instruction
19 if any defendant testifies. If one defendant testifies but the
20 other doesn't, that would be the proposed instruction.

21 MS. MADRIGAL: Yes, your Honor.

22 THE COURT: Ms. Santillo?

23 MS. SANTILLO: I have no objection to that.

24 THE COURT: All right. So could you just give it
25 again?

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1 MS. MADRIGAL: Absolutely. It would be after -- it
2 would be line --

3 THE COURT: Line 9.

4 MS. MADRIGAL: Line 9, after "witness stand".

5 THE COURT: New sentence.

6 MS. MADRIGAL: New sentence. "In addition, even if
7 one defendant testifies, no adverse inference may be considered
8 against the other defendant who did not testify."

9 THE COURT: And then continue with the last sentence.

10 MS. MADRIGAL: Yes, your Honor.

11 THE COURT: Yes. We'll note in the current draft
12 that, as we have in other places, that this is if necessary,
13 and we'll make sure that we scrub for the final version.

14 MS. MADRIGAL: And then, sorry, your Honor. In the
15 event that that does happen and only one defendant testifies,
16 then we would also have to edit the first sentence.

17 THE COURT: Okay. So this is instruction number 47.
18 Go ahead.

19 MS. MADRIGAL: No. I was just still referring to
20 instruction number 46.

21 THE COURT: I'm sorry. What's the suggestion?

22 MS. MADRIGAL: Just that obviously, in the event that
23 only one of the defendants testifies, we will have to edit the
24 first sentence of instruction number 46.

25 THE COURT: I see. Yes. So that sentence would

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1 change to "one of the defendants did not testify in this case".

2 MS. MADRIGAL: Yes.

3 THE COURT: All right, thank you.

4 Next. Any request to number 47 if we're faced with
5 the situation of one defendant testifying and one not?

6 MS. MADRIGAL: No, your Honor. We're fine with that
7 instruction as drafted.

8 THE COURT: Next.

9 MS. MADRIGAL: Instruction number 49 on page 71,
10 accomplice/cooperating witness testimony.

11 THE COURT: Okay.

12 MS. MADRIGAL: We have two proposals. The first
13 proposal would be to add a paragraph after -- on line 4, after
14 that sentence, and the proposed sentence would be the
15 following --

16 THE COURT: So this would be after where it ends
17 "immunity", period.

18 MS. MADRIGAL: Correct.

19 THE COURT: Go ahead.

20 MS. MADRIGAL: "Specifically, Ricardo Hill testified
21 under the terms of a cooperation agreement. Jose Freundt also
22 testified under the terms of a cooperation agreement. Jen
23 Wotherspoon testified under the terms of a non-prosecution
24 agreement."

25 THE COURT: I mean, I suppose just as a preliminary

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1 matter that suggests maybe that the prior sentence should
2 include "non-prosecution agreement", right?

3 MS. CHOI: Correct.

4 THE COURT: So under the terms --

5 MS. CHOI: Right. It says "no one's been immunized".

6 THE COURT: So we would change the prior sentence to
7 "of a cooperation agreement or non-prosecution agreement".

8 MS. MADRIGAL: Yes, your Honor.

9 THE COURT: And then the proposal to lay out
10 specifically who did what.

11 Ms. Choi?

12 MS. CHOI: Your Honor, I think it's highly unusual for
13 any jury instruction to point out specific witnesses falling
14 into those categories. Obviously, as a matter of fact those
15 are the witnesses that are implicated, but I've never seen that
16 happen in any of my trials. Similarly, it's the same reason
17 why we don't have specific agents that are named in the parts
18 where we talk about law enforcement witnesses, or the specific
19 people from the NCUA, or about places where we talk about
20 government witnesses. It just seems like for the same reasons
21 why you didn't want to single out other things with more
22 specificity on the venue counts, it just doesn't really make
23 sense to do that.

24 THE COURT: What's your thinking, Ms. Madrigal?

25 MS. MADRIGAL: The first thing I'd like to say is, we

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1 actually took many parts of this proposal from Judge Rakoff's
2 instruction in our last case, United States versus Lumiere.

3 Now, I do agree with what Ms. Choi said in light of
4 the Court's previous edits to the jury to remove excess.

5 THE COURT: There are examples in this charge in which
6 specific reference is made. It's a compromise. We're not
7 going to rehash the whole case in the jury instructions.

8 MS. MADRIGAL: Understood, your Honor.

9 THE COURT: But for clarity, it might be necessary. I
10 think it may have been that I've given a charge that noted who
11 was being talked about for one reason or the other in this
12 case. I'm not sure it's necessary, so I'd like to know what
13 your thinking is for asking for it.

14 MS. MADRIGAL: We just think it makes it clearer for
15 the jury. I mean, keeps the facts aligned.

16 MS. CHOI: That's for argument, your Honor. I mean,
17 we will make reference to these witnesses and they will make
18 references to these witnesses. There's no need.

19 THE COURT: I don't think it's necessary here. And to
20 try to keep these for what's necessary for clarity and the
21 like, I'll overrule that request here.

22 MS. MADRIGAL: But, your Honor, we are going to make
23 the change from the "grant of immunity" to "non-prosecution
24 agreement".

25 THE COURT: Yes.

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1 MS. CHOI: Yes.

2 THE COURT: I guess one question is, is there anywhere
3 else -- it doesn't seem like it. That's the only change that's
4 necessary. It seems like we can go ahead and cut on page 72
5 lines 1 through 4?

6 MS. CHOI: Yes, your Honor.

7 THE COURT: Okay.

8 MS. MADRIGAL: We have one additional proposal.

9 THE COURT: Go ahead.

10 MS. MADRIGAL: It would be to eliminate lines 6
11 through 8, beginning with "the testimony of such accomplices is
12 properly considered by the jury, "eliminate that sentence.

13 MS. CHOI: Sorry. On which page?

14 MS. MADRIGAL: Same instruction. 71. Lines 6 through
15 8, beginning with "the testimony of such accomplices is
16 properly considered by the jury".

17 MS. CHOI: You would get rid of that?

18 MS. MADRIGAL: We would get rid of that and propose
19 different language.

20 THE COURT: What's the proposal?

21 MS. MADRIGAL: The proposal is a paragraph. So it's a
22 bit long.

23 THE COURT: It's what?

24 MS. MADRIGAL: It's actually a new paragraph that we
25 would like to add.

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1 THE COURT: I'm listening.

2 MS. MADRIGAL: Thank you, your Honor. "The law
3 permits the use of testimony from such witnesses. Indeed, such
4 testimony, if found truthful by you, may be sufficient in
5 itself to warrant conviction if it convinces you of the
6 defendant's guilt beyond a reasonable doubt. However, the law
7 requires that the testimony and motives of such witnesses be
8 scrutinized with particular care and caution. After carefully
9 scrutinizing the testimony of such witness, you may give that
10 testimony as little or as much weight as you deem appropriate."

11 THE COURT: And that's a proposed substitution from
12 where you identified "on" through the paragraph.

13 MS. MADRIGAL: That's a proposed substitution for
14 lines 6 through 8. So eliminating "the testimony of such
15 accomplices is properly considered by the jury, but let me say
16 a few things that you should consider during your deliberations
17 on the subject of cooperating witnesses."

18 THE COURT: Ms. Choi?

19 MS. CHOI: One moment, your Honor.

20 (Pause)

21 MS. CHOI: Your Honor, it's kind of hard because we
22 don't have the text. Could I just see the text for a second?
23 Because I'm a little concerned about the suggestion that it
24 makes with regard to cooperating witnesses. Is this your
25 handwriting?

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1 MS. MADRIGAL: No.

2 MS. CHOI: Just checking.

3 (Pause)

4 MS. CHOI: Your Honor, I don't think there's anything
5 wrong with it as a legal question. I think the question is
6 really, is it necessary? I know that when your Honor was
7 crafting this particular instruction in lieu of the competing
8 views of government and defense counsel and their proposed
9 instruction, that there was language along these lines that you
10 cut out. But, I mean, as a legal matter, I don't think it's
11 incorrect.

12 THE COURT: All right, then let's go with it.

13 MS. CHOI: Okay.

14 MS. MADRIGAL: Thank you, your Honor.

15 THE COURT: Ms. Santillo, are you comfortable with it?

16 MS. SANTILLO: Yes, your Honor.

17 THE COURT: Do you have it on paper?

18 MS. MADRIGAL: I do, but it's Mr. Creizman's
19 handwriting, so I'm happy to read it again.

20 MS. CHOI: It's legible, it's just --

21 THE COURT: Let me say that Mr. Rosen can make out my
22 handwriting.

23 (Pause)

24 THE COURT: What's next?

25 MS. CHOI: Your Honor, I think what's next is

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1 Mr. Creizman's proposal to strike the investigative techniques
2 instruction which is on page 76.

3 THE COURT: That's tied to the request for information
4 regarding the government's investigation of what Agent Beyer
5 said.

6 MS. CHOI: Yes, your Honor. I don't know if you want
7 to wait for Mr. Creizman. I don't know when Mr. Creizman is
8 going to be back. I would like to argue it verbally so as to
9 save paper, but maybe we should wait. I don't know when he's
10 coming back, I guess.

11 MS. MADRIGAL: I just have one additional comment on
12 instruction 53. Regardless of what happens with the issue with
13 Agent Beyer, we still don't believe that there's -- we just
14 don't believe that the instruction is warranted in this case.
15 We haven't called into question, for example, Tate Jarrow's
16 investigative techniques or his undercover work with Coin.mx,
17 anything of that nature, we just don't think that the
18 instruction is necessary.

19 MS. SANTILLO: In 55, either.

20 MS. CHOI: Your Honor, these are standard
21 instructions --

22 THE COURT: Well, let's take one at a time. On
23 investigative techniques, I mean, that is an issue, right?
24 It's been put in issue through the -- setting aside other
25 aspects of why this instruction is given, Mr. Freundt was cross

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1 examined on the interaction with Agent Beyer.

2 MS. MADRIGAL: Yes, your Honor.

3 THE COURT: So I'm not sure exactly -- I suppose one
4 question is for what purpose was that done, and what will you
5 do with it at closing?

6 MS. MADRIGAL: Well, I think that's for Mr. Creizman
7 to speak to, unfortunately, but --

8 THE COURT: Let's come back to that.

9 MS. CHOI: I just note, besides the Ms. Beyer point,
10 if you recall, Mr. Creizman also cross examined Mr. Jarrow
11 about the vault and how certain pieces of evidence were dealt
12 with. So I think irrespective of the question of *Agent Beyer,
13 there are implications with regard to the investigative
14 techniques.

15 Also, this is the standard language here because of,
16 in part, because of Mr. Jarrow's undercover work, not that
17 defense counsel necessarily made hey of that fact, but part of
18 the consideration and the reason we asked for this instruction,
19 and it's one of those things that we deal with, you know,
20 during jury selection is because it is important to the
21 government that this point be made that it doesn't matter --
22 there isn't a requirement that we do XYZ in terms of our
23 investigation, and that the presumption is that these
24 techniques are lawful if they're here, and they should not
25 speculate as to their lawfulness. That's both with regard to

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1 53 and 55.

2 THE COURT: Right. Okay. I agree with that. I'll
3 keep these standard instructions. They're accurate and there
4 is evidence obtained from searches. I think investigative
5 techniques is often given, and in any event is implicated here.
6 So I'll keep both of these.

7 Go ahead, Ms. Santillo.

8 MS. SANTILLO: I think Mr. Creizman's concern was
9 about "law enforcement techniques are not your concern", and
10 they are in this case so --

11 THE COURT: Well, we may need to take -- right. We
12 may need to take that on that argument, but I'll bracket that
13 for the moment.

14 Anything else?

15 MS. CHOI: Instruction 56, which is just that we
16 haven't reached agreement with defense counsel yet about
17 sending the transcripts back.

18 THE COURT: Okay.

19 MS. CHOI: But that might have to be changed depending
20 on what the actual agreement is.

21 THE COURT: All right. We'll note that.

22 I think it would be good if we can just make an agreed
23 list of open issues just so we don't lose any of those. I
24 think I'll just ask my clerk to drop a footnote in the current
25 red line draft so we've got it in there. So dropping a

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1 footnote on instruction 56, sort of pending.

2 MS. CHOI: Right. And I think also with regard to
3 defendant's rights to testify or defendant's right not to
4 testify, and I think the singular, and what ends up happening
5 along those lines is another thing that's an open question.

6 THE COURT: So those are instructions why --

7 MS. CHOI: Yes. Just if we're going to make a list.
8 So sorry. Let me just look at the index.

9 Instructions 46 and 47, depending on what ends up
10 happening in the defense case.

11 THE COURT: Right.

12 MS. CHOI: The questions with regard to withdrawal and
13 multiple conspiracies.

14 THE COURT: And those are implicated in what --

15 MS. CHOI: Instruction 27 is withdrawal from the
16 conspiracy. I don't think the multiple conspiracy instruction
17 is in there because that is what Ms. Santillo filed. But
18 bracket 27.

19 THE COURT: Okay.

20 MS. CHOI: Also, I think -- and this is not an
21 outstanding issue -- I think that we can all agree that 58 and
22 59 will be applicable here, which are the summary exhibits and
23 the excerpts and redactions.

24 THE COURT: Okay. So we can cut the "if applicable"
25 from 58 and 59?

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1 MS. CHOI: Correct. Because I think everyone agrees
2 that's already -- it's there.

3 THE COURT: Yes.

4 MS. CHOI: And then I think the only other issues that
5 are outstanding are, one, the issue that Mr. Creizman brought
6 up with regard to the instruction as to what is a crime versus
7 what is not a crime in the context of the NCUA regulations. So
8 that's one outstanding issue.

9 THE COURT: And that was number?

10 MS. CHOI: That one, I think that this is -- and I'll
11 have Mr. Noble speak to this -- but I think that that's with
12 regard to his request for an additional instruction that I
13 guess is his version of what your Honor has already read to the
14 jury with regard to Mr. Curry's testimony from the NCUA. So
15 that's Mr. Noble's bailiwick, I'm just making the laundry list.

16 THE COURT: Okay.

17 MS. CHOI: Then the last issue with regard to the
18 instructions is just the outstanding Creizman motion of this
19 morning regarding Ms. Beyer.

20 THE COURT: Okay. So if we get Mr. Creizman back
21 shortly, we'll take that up. If not, we'll probably just break
22 for lunch and then take it up after lunch.

23 MS. MADRIGAL: I can address the additional proposed
24 NCUA instruction.

25 THE COURT: Okay. This is the crimes defined by

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1 criminal statutes only?

2 MS. MADRIGAL: Yes, your Honor.

3 THE COURT: Okay. Go ahead.

4 MS. MADRIGAL: So this is obviously in line with and
5 expands on your Honor's instruction to the jury. After
6 Mr. Curry's testimony, we believe that it's necessary to also
7 have an instruction in the charge. And this is what we would
8 propose what we submitted to the Court last night.

9 THE COURT: Mr. Noble?

10 MR. NOBLE: Judge, we oppose the request to charge.
11 We believe the first paragraph of the proposed charge is
12 sufficiently -- the thrust of it is sufficiently spelled out in
13 the existing charge. Specifically, we point to page 4 of your
14 Honor's charge, lines 3 through 10 where your Honor will
15 clearly instruct the jury that they have to follow the law as
16 the Court instructs them on the law, and if any attorney states
17 a legal principle different from what the Court states the law
18 to be, then the jury is supposed to follow the Court's
19 instruction.

20 And then again at the end of the charge, in the
21 concluding remarks on page 85, the Court will again instruct
22 the jury that they are obligated to follow the law as the Court
23 instructs them, whether or not they disagree or agree with a
24 particular law in question.

25 And then it goes on to instruct the jury that they

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1 should not be swayed by sympathy and guided solely by the
2 evidence without regard to the consequences of the jury's
3 decision, and again says "sympathy should not interfere with
4 your clear thinking". We think that those charges will
5 adequately capture what Mr. Creizman and Ms. Madrigal have
6 requested, in addition to the instruction that the Court
7 already gave during Mr. Curry's testimony which, for the
8 record, is the transcripts on February 22nd, 2017 at page 1066,
9 lines 2 through 11 where the Court clearly instructed the jury
10 that "a violation of the NCUA laws or regulations is not a
11 crime in and of itself", and that the jury, in essence, could
12 not convict the defendants for the offenses with which they are
13 charged just based upon a violation of the NCUA laws or
14 regulations, and that evidence of any such violations is simply
15 more evidence that they can consider.

16 We would consent, and we would request that the Court
17 reinstruct the jury as the Court previously instructed the jury
18 with respect to those two paragraphs -- I think I misstated it,
19 but it would be lines 2 through 18 on page 1066 -- at the time
20 of the Court's jury instructions.

21 And then we would also request that the Court just
22 send back with the jury instructions the substantive law and
23 regulations that the Court read to the jury that the parties
24 agreed upon so that the jurors have that for their
25 deliberations along with the rest of the Court's charge. We

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1 think those instructions make it clear that the jury cannot
2 convict just based upon a finding of any violation of NCUA law
3 or regulations, and that they have to follow your Honor's legal
4 instructions, including the legal instructions on the crimes
5 and the elements thereof as charged throughout the rest of the
6 charge.

7 (Continued on next page)

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1 THE COURT: Let's separate this into component pieces.

2 The first is whether there is the need to include in
3 the jury instructions some reference and repetition of the
4 instruction that I gave around, for shorthand, regulations.

5 MR. NOBLE: Sure.

6 THE COURT: It sounds like there's agreement we should
7 do that.

8 MS. MADRIGAL: Yes, your Honor.

9 MR. NOBLE: Yes.

10 THE COURT: So then the question is: Do I give
11 essentially just what I gave before or do I do some different
12 version of it? And the defense, Mr. Lebedev, has proposed what
13 came in last night.

14 MR. NOBLE: Exactly. And the government's position is
15 what I said. We would propose the Court just do what it did
16 before.

17 THE COURT: Okay. So then the question is why not
18 just do what we did before.

19 MS. MADRIGAL: Yes, your Honor. This trial has been
20 replete with instances of witnesses testifying about NCUA
21 rules. I don't think it's sufficient to send back -- this is a
22 really significant issue. Probably three-fourths of the
23 testimony in this trial has been about NCUA regulations. You
24 can't share results of an NCUA examination with nonboard
25 members, you have to follow all of the rules, all of the NACHA

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1 rules, the ACH rules, you have to follow this under the NCUA
2 rules, this under the NCUA guidelines. It's been a large part
3 of this trial, and I don't think the government's instruction
4 captures the importance of the jury being able to separate the
5 two things. The jury can consider violations of the NCUA
6 guidelines in coming to a decision, but they can't solely
7 convict on that basis, and I think it's important that the jury
8 has a separate instruction on this issue just because there has
9 been so much testimony about the NCUA.

10 And we adopted this from Judge Oetken's instructions
11 in United States versus Zemlyansky, and we very closely tracked
12 that language. So a very similar instruction has been given in
13 another case where the issues were -- you know, Mr. Noble's
14 aware -- where there was a lot of discussion about violation of
15 regulations, and this instruction was deemed appropriate in
16 that case as well.

17 THE COURT: I have to say, I got the proposal as to
18 what to read regarding specific regulations, but I'm not sure
19 where that line was drawn, because there has been testimony
20 about specific regulations apart from those that I instructed
21 on. Right?

22 MR. NOBLE: Yes, your Honor.

23 THE COURT: That line wasn't sort of kept clean
24 between what comes in via testimony and what comes in via
25 instruction.

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1 MR. NOBLE: And I think the relevance of that is, as
2 we've argued, and defendants haven't objected to that
3 testimony --

4 THE COURT: No, they haven't, but I don't think that
5 answers the question of whether some further clarifying
6 instruction is appropriate in light of how that testimony has
7 come in.

8 MR. NOBLE: Assuming the relevance of it -- and we
9 think it is highly relevant -- I still don't see why your
10 Honor's previous instruction doesn't fully capture what
11 Ms. Madrigal is requesting.

12 THE COURT: Does anybody have it? I'm not seeing it.

13 MR. NOBLE: I have my one copy I can pass up.

14 THE COURT: Let's start with the first paragraph,
15 Ms. Madrigal. That seems a different point, right?

16 MS. MADRIGAL: Yes.

17 THE COURT: Which I think is captured in my earlier
18 instructions, so as not to confuse the issues. I don't think
19 we need a repetition of that point.

20 MS. MADRIGAL: Yes, your Honor.

21 THE COURT: So I think it's just a question of whether
22 the version of the -- everyone agrees what I've given as a
23 limiting instruction, some version of that goes in, and the
24 only question is whether it's sufficient. So I read as a
25 preliminary matter, "I'll now instruct you on certain

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1 provisions of the Federal Credit Union Act and the NCUA
2 regulations. I instruct you that a violation of any of these
3 laws or regulations is not a crime in and of itself; in other
4 words, the defendants are not charged with criminal violations
5 of the act or NCUA regulations, and you cannot find either
6 defendant guilty based solely upon a violation of the act or an
7 NCUA regulation. If you hear evidence about any violations of
8 the Federal Credit Union Act or NCUA regulations, you may
9 consider it as you would any other evidence in this case."

10 MR. NOBLE: Your Honor, you actually delivered it
11 slightly differently, and you said, going back to, "based
12 solely upon a violation of the Federal Credit Union Act or the
13 National Credit Union Administration regulations," you then
14 said let me say that again, and I'm going to abbreviate NCUA.
15 I'll just read that sentence again, and then you said, "In
16 other words, the defendants are not charged with criminal
17 violations of the Federal Credit Union Act or NCUA regulations,
18 and you cannot find either defendant guilty based solely upon a
19 violation of the Federal Credit Union Act or an NCUA
20 regulation." And then you said: "If you hear evidence about
21 any violations of the Federal Credit Union Act or NCUA
22 regulations, you may consider it as you would any other
23 evidence in this case."

24 I don't think there's a great dispute here. I think
25 the way your Honor actually delivered it is basically what

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1 Mr. Creizman and Ms. Madrigal are requesting in their proposed
2 charge.

3 THE COURT: And then I read the field of membership
4 and boards --

5 MR. NOBLE: Right. Then you give the substance of
6 instructions.

7 THE COURT: And reports to the NCUA.

8 Why doesn't that do it, Ms. Madrigal?

9 MS. MADRIGAL: Your Honor, there's been a lot of
10 testimony about the field of membership and about duties and
11 responsibilities that come with being a member of the board of
12 directors. We just think that although --

13 THE COURT: I wonder if the point can be made by just
14 an adaptation of what I said, which is -- so I said I'll now
15 instruct you. What if it's something like you have heard
16 testimony, and I have instructed you on certain provisions,
17 et cetera.

18 MR. NOBLE: Yes.

19 THE COURT: And then that kind of captures the body of
20 evidence, whether it's come in by instruction or otherwise.

21 MR. NOBLE: We would even consent to, you know, you've
22 heard evidence, and I have instructed you on certain laws and
23 regulations, including those related to field of membership,
24 the duties of board of directors, and reports that are made to
25 the NCUA by credit unions," like specific references to address

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1 the issue that Ms. Madrigal is raising to allow the jury to
2 reference back to the particular evidence that they've heard.

3 MS. MADRIGAL: That would address our concerns, your
4 Honor.

5 THE COURT: Ms. Santillo?

6 MS. SANTILLO: Yes, that sounds fine.

7 THE COURT: Here's what I'll ask that you do: If you
8 could just --

9 MR. NOBLE: Draft it with defense counsel?

10 THE COURT: Yes, pull the words. I couldn't actually
11 tell the difference between what you said I read and what I
12 read other than I substituted -- I hate acronyms, so rather
13 than saying the act, I think I just said Federal Credit Union
14 Act" each time. I think that's the only difference, but if
15 you'll just agree on what it sounds like is joint agreement and
16 put that in by letter, I'd appreciate it.

17 MR. NOBLE: We'll do that.

18 MS. MADRIGAL: Thank you, your Honor.

19 THE COURT: Thank you.

20 MS. SANTILLO: Your Honor, I know we're finishing up
21 the charge conference here, but I want to pick up on the point
22 the government made, which is we have testimony from another
23 examiner, and to the extent there's going to be any discussions
24 of regulations, that we should front the issue and make sure
25 that it's not the witnesses who are testifying about the law.

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1 THE COURT: Okay. You'll discuss that, please.

2 MR. NOBLE: Yes, Judge.

3 THE COURT: Thank you, Ms. Santillo.

4 What else?

5 So, that's it for the charge. As it stands, we have
6 Mr. Creizman now, so I think we have the Beyer and
7 investigative techniques issue, and then we have the verdict
8 form. I think --

9 MS. CHOI: And one other thing, your Honor: The
10 DreamHost motion.

11 THE COURT: Right. And I do want to hear you.

12 I guess the question is should we take a short lunch
13 break and then return? I think that's my suggestion.

14 (Pause)

15 THE COURT: We're going to try to clear a few matters
16 that remain on my calendar.

17 Let's take a lunch break for a half an hour. Is that
18 sufficient? And we'll come back, and we'll address the motion
19 to compel/investigative techniques issue, the verdict form, and
20 the DreamHost email issue, which has been briefed, and I have a
21 few questions before resolution on that.

22 I think that deals with what we need to take up today,
23 with bracketing what I'm going to get briefing from everybody
24 on.

25 MS. SANTILLO: If we're moving off of the charge

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1 issues, I just want to say one thing, which is: We're
2 narrowing down two or three character witnesses, so we would
3 just ask the Court's standard character witness charge.

4 THE COURT: Okay. We'll circulate over lunch my
5 standard character witness charge.

6 So we'll reconvene in a half an hour.

7 MR. NOBLE: Okay.

8 THE COURT: Thank you.

9 MR. NOBLE: Thank you.

10 (Luncheon recess)

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AFTERNOON SESSION

1:06 PM

THE COURT: Picking up where we left off: Go ahead.
So, Ms. Choi, this is a response to the filing on behalf of
Mr. Lebedev last night, or this morning, I'm not sure when,
regarding --

MS. CHOI: I think it was this morning, your Honor.

THE COURT: This morning.

-- regarding --

MS. CHOI: Technically.

THE COURT: -- a motion to compel information that the
government has about Agent Beyer suggesting to Mr. Freundt that
he extract a bonus from Coin.mx before it shuts down and then a
related request as to government investigative techniques.

MS. CHOI: Yes, your Honor. So, if I could deal with
in that turn, I think the first question is whether or not the
government has fulfilled its obligations with regard to
disclosure. I think there is no dispute that we, well in
advance of trial, provided all voluminous 3500 both with regard
to Special Agent Jarrow and his interactions with Ms. Beyer, as
well as with regard to Mr. Freundt's statements, including that
April 2016 statement to the government regarding the statement
at issue. As that 3500 revealed, Mr. Freundt has been
consistent about this representation, that he interpreted
whatever Ms. Beyer said to him as giving him the ability to pay

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1 himself out of the Coin.mx coffers, at least with regard to the
2 backpay or whatever else he might have been owed.

3 So, with regard to that, as your Honor had already
4 ruled when we were dealing with this at sidebar, they have been
5 placed on notice. They could have asked for follow-up. In our
6 view, he's been consistent with this interpretation. They
7 could have asked for follow-up at that point with regard to
8 what Ms. Beyer did or did not say.

9 THE COURT: Wait, I'm sorry. At what point?

10 MS. CHOI: When they got the 3500 material. They made
11 the choice, strategic or otherwise -- when the material makes
12 clear that this has been Mr. Freundt's position consistently,
13 they didn't ask us for follow-up with regard to what happened
14 to Ms. Beyer, have you interviewed her, have you talked to her,
15 or anything along those lines. They made the decision,
16 strategic or otherwise, to at least take at face value what
17 Mr. Freundt had said in those prior statements to the
18 government.

19 THE COURT: No, they made the decision not to take it
20 at face value. They thought it so shocking, that it unlikely
21 to be true. Now, you can call that a strategic decision, but
22 at least the representation as to the timing of this was that
23 they were surprised to have a government witness say that a
24 government agent had told him to help himself to \$5,000, and it
25 was upon that moment of realizing that he was sticking to that

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1 testimony here in court, that the issue took on a new light for
2 them.

3 Let me just say, I don't think waiver is where you
4 want to be going.

5 MS. CHOI: It's not a waiver argument, your Honor. I
6 think it's an argument about whether or not -- what should we
7 do now and what is the current testimony.

8 THE COURT: Yes.

9 MS. CHOI: With regard to our Giglio obligations, we
10 have no information that that statement was false, so we were
11 not obligated at that point to disclose or presently to
12 disclose because we were not aware of any information to the
13 contrary, and I think part of that goes to what I have alluded
14 to before, which is that this is an agent who took an extended
15 period of leave having nothing to do with her integrity or her
16 truthfulness, so we didn't have a Giglio obligation with regard
17 to that.

18 But having totally to do with personal circumstances,
19 we knew that we didn't have to call her, nor the dozens of
20 other witnesses that may have participated on the takedown day.
21 And we ran our normal Giglio checks, as we do, to see if there
22 would be anything else, and we did not get any positive hits
23 with regard to that while she was on this extended leave.

24 Now, the testimony, as it currently stands, is: As
25 your Honor precluded us from clarifying, it is that there is a

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1 special agent who was part of this investigation, who gave Jose
2 Freundt the ability to go and do this backpay, okay. So this
3 is something that goes to the integrity of the investigation.
4 Your Honor precluded the government from clarifying her role
5 through that witness of whether or not he's even seen her
6 again. So as of now, it is a law enforcement officer who has
7 in some way sanctioned this activity and participating in the
8 investigation. The defense is free to argue from that.

9 Now, the relief that they seek, which is different
10 than what Mr. Klingeman --

11 THE COURT: Well, one point on that: If I wasn't
12 clear, the reason for precluding that testimony was that this
13 witness, though he can testify to his continuing contacts with
14 that agent, has no basis for knowing what the agent's -- and I
15 actually think this hooks back up to where we are -- has no
16 basis for knowing what the agent's role was. And part of
17 Mr. Klingeman's motion in this regard was that from what the
18 government had represented, the government didn't much know or
19 fully investigate what her role was.

20 MS. CHOI: Your Honor, I think it's two different
21 questions. One is, I can make representations about what her
22 role was in the investigation of Coin.mx. What I couldn't make
23 a representation about is what she told Jose Freundt. That, I
24 cannot make any representations about at this point because we
25 have no information about that.

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1 I can tell you what I know from -- as is the same as
2 what defense counsel knows because we've disclosed it, we've
3 disclosed the communications she had with Mr. Jarrow leading up
4 to the takedown, the fact that after she interviewed both
5 Mr. Freundt and Ms. Wotherspoon the day of the arrest on
6 July 21st, that there had to be follow-up reports of what those
7 conversations were that she sent back to Special Agent Jarrow.
8 And I can represent to you, your Honor, that, in combination
9 with this hard drive issue -- I'm not sure I can look at the
10 3500, but when the timing of the return of the hard drives
11 were, that's it. She has not done anything else with regard to
12 the investigation, she has not interacted with any of the
13 government witnesses. We don't view her as any different than
14 any other of the dozens of law enforcement officers that were
15 involved on the day of the arrest in multiple different
16 countries.

17 THE COURT: I accept that, and, yet, my ruling on the
18 question of witnesses is that that witness would have no
19 insight into that information, and I was uncomfortable with the
20 suggestion that was being elicited by the proposed question
21 that he somehow could speak to what that agent's level of
22 involvement in the investigation was.

23 MS. CHOI: Right. And to be clear for the record, the
24 question the government posed was: Have you ever dealt with
25 her after that date, and you precluded us from going down that

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1 road. Be that as it may, I think everyone agrees the present
2 state of play is there is purportedly a rogue special agent of
3 the Secret Service who suggested to Mr. Freundt that he should
4 take this money, and she had some role in the investigation,
5 right? Those are sort of the predicate facts as to how they
6 presently are in the record.

7 THE COURT: Yes. And it's a cooperating testifying
8 witness who was encouraged by the state of facts as we have it
9 not at the time, but now --

10 MS. CHOI: Correct.

11 THE COURT: -- to take money from Coin.mx before it
12 shut down.

13 MS. CHOI: Well, I think it's actually the inference,
14 your Honor, that he was not a cooperating witness at the time
15 when he was given that inference.

16 THE COURT: Right, but he is now.

17 MS. CHOI: Right. Maybe I misinterpreted, I think you
18 maybe said the opposite. But, yes, he was not a cooperating
19 witness at the time these statements were made, he is now, and
20 I think on redirect, it was established that we will be getting
21 that money back through the forfeiture and restitution.

22 But in any event, that's the state of play. We are
23 all in agreement with what's going on. The remedies that
24 Mr. Creizman are now seeking, the specific applications he's
25 now seeking, I think are now inadmissible for two different

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1 reasons:

2 One is, it is of marginal relevance with regard to
3 that particular statement unless it is -- that they're going to
4 make the opposite point, which is that Mr. Freundt was lying
5 when he took the stand, in which case it's barred by Rule
6 608(b), because it would be extrinsic evidence in order to
7 prove that this particular law enforcement witness was lying.

8 So if we go down the road -- sorry, that this
9 particular cooperating witness -- I'm sorry, your Honor, I'm
10 feeling a little bit ill right now -- that the cooperating
11 witness was lying at that time, right? That would be the only
12 reason for them to want to call Special Agent Beyer or to get
13 other further information with regard to that. And that is
14 flatly barred by Rule 608(b).

15 Alternatively, they may call Ms. Beyer for some other
16 purpose, but to do so, you need to realize that -- and it's a
17 longstanding rule of common law -- that you can't simply call a
18 witness in order to impeach her own credibility. So they would
19 have to establish some other relevance that Ms. Beyer would be
20 able to, in this eleventh hour, add to this particular case. I
21 would posit, your Honor, that this is a sideshow. It is not --
22 the point they wanted to make with regard to the investigation
23 has been made. They are free to argue that with regard to
24 closing. To now reopen this, to have Ms. Beyer take the stand
25 in order to impeach an external cooperating witness, is not

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1 allowed under the rules. It's -- that line of questioning
2 would not be allowed under the rules under Rule 608(b), or,
3 alternatively, simply to call her to make the further point
4 that this is a corrupt law enforcement agent and try to impeach
5 her would also not be allowed under the rules because you're
6 not allowed to call a witness in order to impeach her.

7 Quite frankly, if the defense is going to go down that
8 route, there are obligations they need to meet, which they
9 allude to because they understand in full -- understand full
10 well that there are certain regulations that they need to deal
11 with, which include their Touhy obligations. They haven't sent
12 a Touhy letter. Who knows what kind of delay this would create
13 with regard to this issue. At best, either -- testimony that
14 is precluded, that would be precluded because it would simply
15 be to impeach Jose Freundt or is cumulative of the fact they
16 already have it in the record, which is that there are
17 questions with regard to Ms. Beyer. And separately from that,
18 I think, given that the current record is what it is, and your
19 Honor has recognized this, that's why we need the investigative
20 techniques question because I think they can argue that there
21 is a problem with regard to Ms. Beyer, and they are obviously
22 going to be able to do that given your Honor's rulings, but I
23 think the jury should be instructed on some level not to
24 speculate writ large about what role that might be in the
25 bigger investigation. If she is called to the stand, I think

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1 it will be consistent with what I've said to your Honor, which
2 is that she did not play a large role in the investigation
3 beyond the ones that we have already identified. There is no
4 evidence that's been admitted to date where her credibility
5 would be at issue, there's no chain of custody problems that
6 implicate her, there are no representations that were made by
7 her to law enforcement that we've relied on in any of the
8 evidence to date.

9 So it would simply be a sideshow on an issue of either
10 marginal relevance or one already established by the defense.
11 So, at this eleventh hour, I don't think that there is any
12 basis for the application. I don't think it's necessary, and I
13 think it will create a sideshow about the government's entire
14 investigation being questioned when there really isn't a great
15 factual basis for it.

16 THE COURT: The first half of the application, which
17 is to compel the government to turn over any materials related
18 to the investigation, I'm not sure I caught what your precise
19 response -- you said you've met your Giglio obligations.

20 MS. CHOI: Yes, we don't have any further information
21 about what else happened with regard to investigating this
22 issue with regard to Ms. Beyer, I think in part because when it
23 first came up, again, she was gone for an extended period of
24 time. I think she might be back at Secret Service, I'm not a
25 hundred percent sure of that, but she was gone for an extended

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1 period of time for personal reasons, and so, as a result, I'm
2 not sure -- I don't know what the actual status is with regard
3 to that, but we are not aware of any information, one way or
4 the other, about whether she was questioned about this
5 particular issue.

6 THE COURT: Is your response, then, to the specific
7 request to compel, that you don't have any additional
8 information?

9 MS. CHOI: Correct.

10 THE COURT: That you aren't saying they're not
11 entitled to it, you have nothing further?

12 MS. CHOI: Well, I think under Giglio and Brady, it's
13 what information we have presently, and we don't have any other
14 information. So I can't even represent that the question has
15 been posed to her because I don't know if that has, in fact,
16 happened, in part, because she was gone for this extended
17 period of time.

18 The obligation is only coextensive to the fact of the
19 material facts existing, and that it would be in our
20 possession. We don't have either of those.

21 THE COURT: Mr. Creizman?

22 MR. CREIZMAN: Yes. I think one aspect that the --

23 THE COURT: Microphone.

24 MR. CREIZMAN: Sorry.

25 I think one aspect that the government is ignoring is

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1 the idea that a person who's coming in to cooperate would
2 reveal in a proffer session, and there's only notes of one
3 proffer session where this disclosure exists. It's not that
4 we've seen that he consistently maintained that position until
5 the trial, but he expresses something that would sound to me
6 that would raise issues -- thoughts that either this person had
7 extreme skepticism by the government and would be a situation
8 where they would be pressing him very hard as to whether he was
9 telling the truth or not, and/or it would raise significant
10 concerns about the conduct of a special agent for the Secret
11 Service. This would raise significant issues of misconduct.

12 And it would seem to me whether she's on leave or not,
13 as long as she's still with the Secret Service especially, it
14 would seem a pretty easy -- it wouldn't be that hard for them
15 to reach out to Special Agent Beyer, whether it be the
16 government, the Secret Service, and say, hey, Special Agent
17 Beyer, what happened, did you tell him that he could withdraw
18 this money, you knew that this was a money-transmitting
19 business, you knew the whole background, and, again, we can
20 produce the 3500 material that would suggest this, and then
21 Special Agent Beyer would have an answer.

22 So, what this raises is whether the government, in a
23 sense, consciously avoided finding out the truth, because if
24 they found out the truth that Special Agent Beyer had indeed --
25 that Freundt was lying, then they wouldn't be able to put

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1 Freundt on as a witness, or they would admonish him very
2 significantly, or Special Agent Beyer would be questioned, and
3 there would be a whole issue with respect to that. Why did
4 Special Agent Beyer let \$5,000 -- it may very well be true that
5 Jose Freundt wouldn't have taken out \$5,000 unless Special
6 Agent Beyer told her it was okay. In that sense, there must
7 have been some sort of belief that Jose Freundt was -- whatever
8 he was doing was completely -- he was okay, whatever he was
9 doing, he didn't know, it was legal, and then for the
10 government then also, knowing that he took the \$5,000, it's not
11 just a matter of forfeiture from your crimes, this is more, you
12 took \$5,000, okay, this is an illegal money-transmitting
13 business, you better give that money back right now. That
14 doesn't seem to have happened.

15 So these are issues that I think are very probative of
16 the investigation of whether Jose Freundt was telling the truth
17 or not, what the government did to determine whether Jose
18 Freundt was telling the truth or not, were they happy to have a
19 cooperating witness just as long as, look, I don't want to
20 know -- if he's lying, I don't want to know. That's the
21 concern. That's the other aspect of this that I don't think
22 the government is recognizing here, and it's significant.

23 THE COURT: Well, I think there's still the question
24 of what -- so what is the specific application? And what are
25 you going to do with it? Obviously, when Freundt was on the

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1 stand, you get to impeach, and you get to inquire about matters
2 that would go to his truthfulness.

3 MR. CREIZMAN: That's correct.

4 THE COURT: So then the question is now -- and you
5 might be right -- what is left to do that has relevance to the
6 case.

7 MR. CREIZMAN: I think it would be relevant to -- I
8 think it's relevant to --

9 THE COURT: So the first thing: They say they don't
10 have anything more. So you've sought to compel them to produce
11 whatever they have as to their investigation as to what
12 occurred.

13 MR. CREIZMAN: But when I say "they," I would mean the
14 prosecution team, and that would include the Secret Service,
15 that would include some sort of office of professional
16 responsibility from the DOJ. The U.S. Attorney's Office
17 sometimes would say narrowly we don't have it, the Secret
18 Service has it. It's concerning to me. The more I've thought
19 about this, the more it raises the issue, did the government
20 put on a witness that -- I would tend to think that -- they had
21 to be more skeptical than just saying that makes sense, let's
22 move on, oh, we'll check out with Special Agent Beyer, and then
23 Special Agent Beyer is on leave, so we'll leave her alone.
24 That doesn't sound --

25 THE COURT: That's the representation -- well, I think

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1 it's slightly different. This is my interpretation of the
2 government's stance: They think it's she said something to him
3 that gave him the impression that he could do this, which is
4 different than, Mr. Freundt, go help yourself to a nice bonus,
5 so there's a gray area. He interprets it as authorization to
6 do this. They were concerned, they've told me, they contacted
7 Secret Service, they learn that she's out on leave for an
8 unrelated matter, and they let it go.

9 MR. CREIZMAN: Right. But that's the thing, they let
10 it go. Meaning it probably was -- it could have been a
11 misunderstanding.

12 THE COURT: What are you going to do with the fact
13 that they let it go? Ultimately, where does this go?

14 MR. CREIZMAN: The government is so desperate to
15 convict Yuri Lebedev, that they found a witness who said
16 something that would certainly result in an investigation of an
17 agent. There was no investigation of any agent. They chose to
18 be just willfully blind to knowing whether he said -- whether
19 he was being truthful or not. No one seems to have been
20 punished for this. There's been no explanation. It would have
21 been a simple call. All you had to do is call Ms. Beyer, but,
22 instead, rather than find out what the truth was, Jose Freundt
23 got on the stand and said what he said. Who did you commit
24 your bribery with, which I find to be an objectionable question
25 because it's a conclusion, but who did you commit your bribery

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1 with? Yuri Lebedev. Well, you took 5 -- either he lied about
2 the \$5,000, and the government let it go, he lied about being
3 authorized to take it, or he was actually told that he could
4 take it, and the government is not doing anything about -- the
5 government still hasn't asked for the money back, and the
6 government still hasn't done anything to determine what the
7 status of Special Agent Beyer is, whether she should be fired,
8 or whether she should not have leave anymore, whether she
9 should be out.

10 That's the one area where it's not clear. How much
11 due diligence did the government do in checking out Jose
12 Freundt and whether he was someone that they should offer to
13 the jury -- the testimony to the jury, because I think the
14 government probably believes there was a rogue agent. I don't
15 know what the government believes. Or that there was a
16 mistake, but that would be easy enough to figure out, what did
17 Ms. Beyer say? Did she say -- I mean, it's important. Then
18 that, too, would go to Jose Freundt's credibility, too, if the
19 jury heard that Ms. Beyer said -- I don't know how you get --
20 look --

21 THE COURT: On that point, the point you just started
22 there making, that's where I think the government's 608
23 objection kicks in.

24 MR. CREIZMAN: But I think that this is -- first of
25 all, I'm not so sure that it is a collateral issue, but even it

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1 were, I don't think 608(b) necessarily precludes -- I think
2 that the Court has discretion to allow questioning on it. And
3 certainly I may not be able to prove something up with
4 extrinsic evidence, but I could certainly ask a witness about
5 it.

6 THE COURT: Right, you can ask -- that comes back to
7 my first question. I think, clearly, these are areas to have
8 been, and were, explored with Freundt. You gave Ms. Choi a
9 hard time about the waiver argument, but maybe this is a
10 version of what she was saying. There was an opportunity to
11 kind of pursue matters that go to this point that could have
12 appropriately been part of the cross-examination of Freundt.
13 At some level were.

14 MR. CREIZMAN: I think I exhausted those points with
15 respect to Mr. Freundt. The question is what did the
16 government do and what happened to Special Agent Beyer.

17 THE COURT: To the extent you sort of say there are
18 those points, if they ultimately come back to impeaching
19 Mr. Freundt, right, then, yes, you could have inquired about
20 them, but to the extent you're trying to prove them up by
21 suggesting you might call Agent Beyer or the like, what's your
22 response to the contention that that just turns into a 403/608
23 problem?

24 MR. CREIZMAN: But what if it turns out that the --
25 what if there is an argument that the government wasn't careful

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1 enough about whose word they accepted as true and whose word
2 they offered to the jury? And they weren't careful enough
3 because they didn't pursue this, they didn't pursue something
4 that you would expect the government to pursue if they found
5 out that an agent might have been involved in misconduct? It
6 would have been -- it's not that complicated to call a person
7 and say what happened. There are plenty of communications back
8 and forth between Tate Jarrow and Special Agent Beyer, and
9 there was no discussion of this particular \$5,000, you know,
10 you're authorized, take a nice bonus for yourself. So why not?
11 Why was there no -- or was there, and if there were, if there
12 was something, I think we should know. And if there wasn't, we
13 should know, too, because it goes to whether the government is
14 putting on witnesses that -- look, this is who -- I mean, it
15 really -- the government's case is this weak, that they have to
16 put on someone who they don't want to find out whether it's
17 true or false. That is the concern.

18 (Continued on next page)

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1 THE COURT: Ms. Choi.

2 MS. CHOI: Your Honor, that is precisely the question
3 of whether the government wasn't careful enough is -- with
4 regard to this particular issue is precisely what the jury is
5 here for. Right? I mean as it presently stands, they're going
6 to be able to argue, and I presume that's what they are going
7 to argue, that Special Agent Beyer is a rogue agent, it
8 undermines the entire integrity of the investigation.
9 Mr. Creizman's representation that we are so desperate as to
10 need Jose Freundt -- willing to bend over backward to have Jose
11 Freundt take the stand is belied by the clear documentary
12 evidence that Yuri Lebedev himself offered to pay the bribe,
13 not once but twice in that --

14 THE COURT: I don't need to hear your summation.

15 MS. CHOI: Fair enough. I just don't understand -- at
16 bottom, your Honor always goes back to what is the application?
17 I don't know what the application is now, because if it's just
18 the jury should be able to question the government's integrity,
19 that's the record they have. That is precisely the record they
20 have. It's record that your Honor protected when you limited
21 line of redirect that we sought to introduce. So they have
22 that argument.

23 I don't really know what the prejudice is with regard
24 to this other suggestion that's impugning what we did with
25 regard to trying to follow up on this question. I can

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1 represent to your Honor, when you were explaining to me -- or
2 explaining to Mr. Creizman that there could be this sort of
3 middle ground, that's I think where we find ourselves.

4 We have no information standing here to the contrary
5 of what Mr. Freundt said and what his belief was, which is
6 whatever she may have said to him that gave him authority. And
7 they are free to argue that that undermines the government's
8 case. And I don't see what --

9 I think your Honor has pointed out the crux of the
10 matter, which is, if it's not that, if it's going to be
11 something else, if it's not undermining the government's case
12 because of the integrity -- our integrity has been called into
13 question, that is all precluded by the rules.

14 MR. CREIZMAN: The question is, we can argue that
15 Special Agent Beyer is a rogue agent. We could argue that Jose
16 Freundt was clearly lying, what kind of special agent would let
17 someone take \$5,000.

18 THE COURT: I mean, you could even do the either/or.
19 Either Jose Freundt lied to you on the stand and told you that,
20 you know, an agent of the United States Secret Service told him
21 to take \$5,000, or there's a rogue agent that the government
22 hasn't called here to testify -- well, anyway, I won't --

23 MS. CHOI: Wait a second.

24 THE COURT: -- I won't start that one. I'm sustaining
25 my own objection.

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1 MR. CREIZMAN: But that is the point.

2 THE COURT: Well, so then make your application. Not
3 we want to call Agent Beyer to the stand to impeach Jose
4 Freundt, but Ms. Choi and I have invited you, what's the
5 application? What are you asking for?

6 MR. CREIZMAN: I would like to know whether any -- I
7 think that I would like to know whether anyone was assigned
8 from either the secret service, the Department of Justice
9 Office of Professional Responsibility, the U.S. Attorney's
10 Office, someone was assigned to investigate this claim. I
11 can't imagine, once Jose Freundt walks into the U.S. Attorney's
12 Office with his lawyer, I could just imagine -- I mean, if I
13 heard a client say this to me, I would be very reluctant to
14 bring that client into the U.S. Attorney's Office for a proffer
15 without -- just to say something along those lines, 'the agent
16 told me to do it'. And I would imagine that there would be
17 fierce questioning of that on Jose Freundt. And maybe Jose
18 Freundt held up to it. But then why shouldn't the jury know
19 that Special Agent Beyer is on leave, and that there was no
20 investigation done. That the government basically says I
21 want -- you know, Mr. Freundt -- they know that Mr. Freundt
22 testified about this while he's saying "I think that I was able
23 to take \$5,000 out because Special Agent Beyer told me I
24 could".

25 Now, the government assumes that maybe he

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1 misunderstood it, and maybe that's what happened, but we don't
2 even know because no one ever asked him. Or maybe they did. I
3 don't know.

4 So I would like to know, at least at a minimum, I
5 think that there are some documents, there must be some
6 writeup, some 302s. I noticed that in some of the 3500 there
7 are redactions. I don't know if the redactions include -- I'm
8 sure that that's not true -- I'm not suggesting that that's
9 what's redacted -- I'm just saying that there are words that
10 could exist but I would like to see that. I think we're
11 entitled to that.

12 THE COURT: If you're talking about what's already in
13 the government's control, they've made multiple representations
14 that you have everything relevant to Mr. Freundt's testimony.

15 MR. CREIZMAN: They've made multiple representations
16 that the U.S. Attorney's Office doesn't have it. I'm wondering
17 if they're making representations that the secret service
18 doesn't have it, that they're totally unaware of the secret
19 service internal investigation, that they're totally unaware of
20 a Department of Justice Office of Professional Responsibility
21 investigation. I think that those would be -- that's
22 information that I would like to know.

23 I mean, it's not as if we had -- you know, just in
24 terms of the waiver argument just so that doesn't come back so
25 quickly before I comment on it -- that I think it was maybe two

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1 or three days before trial that we got Freundt 3500. It may
2 have been more. It may have been more. I'm just saying, it
3 wasn't more than a week. Okay?

4 MS. CHOI: That's not true.

5 THE COURT: It was two weeks, I think.

6 MS. CHOI: Yes, your Honor. It was two weeks. It was
7 the 27th of January.

8 MR. CREIZMAN: No. There was NCUA materials that --

9 MS. CHOI: No, that was on the 24th.

10 THE COURT: One person at a time, even if you think
11 you're right.

12 MR. CREIZMAN: Look, I may be wrong, that's my
13 recollection. But look, even if it was two weeks, that's not
14 exactly a lot of time after you see it in one piece of -- and
15 there's 500 pages -- 500 different documents on Tate Jarrow so
16 you can piece the whole thing together. And even then, when I
17 prepared my cross examination, I did not think that that was
18 what I was going to get. And, I mean, thank God, that was
19 great. But I say, I think that there's more to be -- I mean, I
20 think I'm doing a disservice to my client if I don't pursue
21 this additional material.

22 THE COURT: Well, you've pursued. That doesn't answer
23 what you're entitled to.

24 As the government sits here, do you have some sense
25 that the secret service or DOJ -- the sort of examples he's

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1 listed -- that there's some body of material out there, or you
2 don't know, or what?

3 MS. CHOI: This is what I can represent is that we ran
4 our standard Giglio checks, which our understanding is that
5 checks against whatever internal DOJ OPR investigations may be
6 going on -- although I need to doublecheck that -- but that's
7 my understanding is we run these checks so that we can do it
8 agency wide.

9 THE COURT: So you ran Freundt through that system.

10 MS. CHOI: No, I ran Beyer through that.

11 THE COURT: I'm sorry, Beyer.

12 MS. CHOI: Yeah, I don't think they would have
13 anything on Jose Freundt, your Honor.

14 And there were no potential checks, and I believe that
15 that was in the Fall of 2016 and sort of as we were preparing
16 for the first trial date that we -- or at least the original
17 trial that we had had.

18 THE COURT: When did you communicate concern to the
19 secret service?

20 MS. CHOI: The day that it happened. Because we
21 pressed Jose Freundt -- sorry. April, 2016. Because when we
22 pressed him on this question --

23 THE COURT: So is that before or after you ran Beyer
24 through the --

25 MS. CHOI: Before. So April, 2016 is when this

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1 occurred, and we again --

2 THE COURT: Sorry. You're saying "when this occurred"
3 and I don't know what you mean.

4 MS. CHOI: April, 2016 is the first time Jose Freundt
5 made that representation to the government.

6 THE COURT: Okay.

7 MS. CHOI: And I called Special Agent Jarrow and I
8 said -- he was not in town, he was on extended training
9 elsewhere in anticipation for his transition to his next part
10 of his job. And I said, "We need to figure out what was going
11 on for this."

12 He made -- my understanding is he made several efforts
13 to try to follow up in that timeframe, which I've already
14 discussed with your Honor, and that's when we learned that she
15 was on extended leave for personal reasons for multiple -- and
16 that she was expected to be out for an extended period of time.

17 THE COURT: So did Agent Jarrow speak to Beyer?

18 MS. CHOI: I don't know. I don't think -- I don't
19 know. I can't -- I don't want to make a representation one way
20 or the other about speaking to her about this particular issue.

21 THE COURT: Well, then I guess then I'm not sure
22 what -- so that confuses me a little. Because what I had sort
23 of taken away what you said was, "We were concerned, we pursued
24 this, she was sort of unavailable for follow up because she was
25 out on leave on this unrelated issue."

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1 MS. CHOI: Correct.

2 THE COURT: But now you're saying, "We told Agent
3 Beyer to check it out. I don't know what he did."

4 MS. CHOI: Jarrow.

5 THE COURT: Do you know if he talked to her?

6 MS. CHOI: I don't because I think -- I don't mean to
7 get the chronology confused here, but we made the decision we
8 weren't going to call her because we didn't need her testimony
9 because it's not related to the evidence that we had at hand.

10 THE COURT: Why is that?

11 MS. CHOI: Sorry, why?

12 THE COURT: Yes.

13 MS. CHOI: Why? Because she doesn't -- because none
14 of the pieces of evidence we've introduced to the jury that
15 have anything to do with her, your Honor.

16 THE COURT: No, I meant -- oh, okay. I misinterpreted
17 "call". I thought you meant you made a decision not to contact
18 her.

19 MS. CHOI: No, I'm sorry. Not to call her as a
20 witness, your Honor.

21 THE COURT: Okay.

22 MS. CHOI: But irrespective of that, we understand our
23 obligation to be that if there's anyone that's part of a
24 takedown day, that's on any of the reports that we've written,
25 we do a Giglio check. And we did the Giglio check, and nothing

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1 came back. And I was under the impression she was still out
2 during this entire period of time.

3 But you're right, sitting here today, I can't make a
4 representation to you about whether or not at any point --

5 THE COURT: How did you learn that she was out -- that
6 was from --

7 MS. CHOI: Special Agent Jarrow trying -- multiple
8 times trying to get in contact with her and then being told
9 that she had -- I mean, again, that something had happened, and
10 she could not be -- she was not at the secret service
11 presently, and that she was expected to be out for an extended
12 period.

13 THE COURT: So in that, you don't know whether he
14 spoke to her or not.

15 MS. CHOI: Yes, your Honor. I don't know ultimately
16 if that conversation happened about this particular issue.

17 THE COURT: I mean, what do you understand would be
18 your obligation -- to the extent that Agent Jarrow might have
19 notes, for example, of a conversation with Beyer that suggests
20 what Freundt said was untrue, what would you understand the
21 government's obligation to be there?

22 MS. CHOI: Correct. That's why I don't think he -- if
23 that had happened, he would have told me, which is why I don't
24 think there -- I would presume that there wasn't such a
25 conversation, but I don't -- I also don't want to say one way

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1 or the other. I mean, because I can't -- I have not posed that
2 precise question to Special Agent Jarrow. But I understand, if
3 there was a subsequent conversation in which she said, 'No, he
4 is a liar,' then we would have an obligation to disclose that,
5 but that's not my understanding of what has occurred.

6 THE COURT: Do you think you have an obligation to ask
7 Agent Jarrow that? I mean, you tell me. If you think you
8 don't, I want to hear that, or do you think you do?

9 MS. CHOI: We'll follow up with Special Agent Jarrow.
10 But I think as it presently stands, that I think is a separate
11 question from the nature of the application here. I'm not
12 hearing from -- I'm not hearing from Mr. Creizman any
13 particular thing --

14 THE COURT: I guess I think of it of at least a subset
15 of the application. Right? He wants to know what the
16 government learned, which -- and the reason he wants to know
17 that potentially, it goes to two things. It goes to the
18 truthfulness of what Freundt said, and it may go to an argument
19 which may or may not be available, but an argument that he's
20 articulated as to government tactics in the investigation,
21 prosecution of this case.

22 So you've agreed to ask -- let me just make sure I
23 understand the scope of what you said you'll do. You've agreed
24 to ask Agent Jarrow whether he -- I mean, is the question
25 whether he has anymore information from Beyer or anyone else as

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1 to this conversation between Beyer and Freundt?

2 MS. CHOI: Yes. I think that we can do that. And I
3 don't -- we will let you know, I'll let defense counsel know
4 what the answer is, but I think we can ask that one question to
5 Special Agent Jarrow.

6 THE COURT: And then I guess the question is, is that
7 question any different from does the secret service have any
8 information from Agent Beyer as to this conversation between
9 Beyer and Freundt? And that's a question. Is it the same
10 thing or is it different?

11 MS. CHOI: I guess -- I mean, I guess it's not. At
12 least from our perspective, we'll ask that question to Special
13 Agent Jarrow and see if he knows of anything else.

14 THE COURT: I'm sorry. When you say "it's not", it's
15 not different?

16 MS. CHOI: Right. He's part of the secret service, so
17 I think his knowledge is part of this, so we will ask him the
18 question of if he knows of any follow up -- of whether or not
19 there is any evidence or, you know, information that would be
20 contrary to what we presently know to be the case, which is
21 that something was said by Special Agent Beyer. I don't know
22 where that will go, but we can ultimately ask the question.

23 THE COURT: Seems like we should know where that goes.

24 MS. CHOI: Okay.

25 THE COURT: Does that get at the core of the motion to

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1 compel?

2 MR. CREIZMAN: It does, because it would -- I mean, it
3 gets there because it would help -- I mean, I might want to
4 recall -- or I didn't call him in the first place -- but
5 Special Agent Jarrow, and I think this would be a legitimate
6 line of questioning. What did the secret service do when it
7 found out that this person that you, you know, Special Agent
8 Jarrow, you advised -- you were in contact with Special Agent
9 Beyer, you advised Special Agent Beyer about all of this, you
10 found out that Freundt is saying that, you know, Special Agent
11 Beyer said, "Enjoy a nice bonus. Take your salary and enjoy a
12 nice little bonus," which is in quotes in the 3500, and then
13 what did you do? What did the secret service do? Did you --
14 you know? I think that that's important to show -- I mean,
15 look. This is the investigation that was done.

16 MS. SANTILLO: Your Honor, we join in the application.
17 And I just think that -- I don't want to -- I hear some sort of
18 artificial narrowing of Agent Jarrow's information to just what
19 Agent Jarrow knows --

20 THE COURT: It's the secret service. I mean,
21 that's --

22 MS. CHOI: Yeah.

23 THE COURT: -- that's Brady obligation.

24 MS. CHOI: That's fine. I'm just saying, that's how I
25 would figure out what the secret service knows is to ask

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1 Special Agent Jarrow.

2 THE COURT: I understand you to say there's no
3 distinction to what Agent Jarrow knows on this and what the
4 secret service knows on this.

5 MS. CHOI: Right. But I guess, you know, I think
6 we're getting ahead of ourselves a little bit, but I would
7 guard against again calling Special Agent Jarrow back to probe
8 on this question until we figure out what, if anything, is
9 really there.

10 THE COURT: Well, if it turns out that the government
11 sort of -- and I'm not impugning -- but if the government, in
12 the sense of the prosecutors here, should have followed these
13 steps, which you're saying you'll do now, and didn't, and that
14 produces new material, then I think there is the question of --
15 then it is the question of what should be done with it. I
16 mean, if you learn --

17 MS. CHOI: See what the answer is.

18 THE COURT: -- if you didn't ask Agent Jarrow the
19 question, "Did you speak to Beyer?" And if you ask that now
20 and it comes back, "Yeah, and she says he's totally making that
21 stuff up" --

22 MS. CHOI: Right.

23 THE COURT: -- they can do something with Agent Jarrow
24 on that, I think.

25 MS. CHOI: Yeah. And if it comes back and it's not

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1 that and it's that there's no new information, then we'll deal
2 with it -- which I think is the most likely outcome here --

3 THE COURT: I hear you.

4 MS. CHOI: -- then we'll deal with it then. But I
5 think we're getting a little ahead of ourselves here, and we'll
6 ask that first question first.

7 THE COURT: All right.

8 MR. CREIZMAN: I think it would be fair just to
9 understand what Agent Jarrow did and the chronology of what he
10 did. You know. Who he reached out to, what happened. And I'm
11 by no means -- and I want to be clear because I respect my
12 colleagues, Ms. Choi and Mr. Noble, Mr. Shin, and everyone at
13 that table very much -- so it's not impugning their integrity,
14 so I want to make that clear.

15 THE COURT: I appreciate what you're saying.

16 MR. CREIZMAN: I do. Really, I do. But at the same
17 time, you know, there's certain things that -- well, whatever.
18 I'm going to sit down. Thank you.

19 THE COURT: Okay. So to the extent that the
20 application is as we've described, the government is going to
21 do that follow up, and if there is information to turn over, it
22 will be turned over. If there is any such information, we'll
23 deal with that, and if there's not information, Mr. Creizman,
24 are we done?

25 MR. CREIZMAN: If there's no new -- I mean, there's

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1 going to be -- well, your Honor, I feel like there will be
2 information. Whatever -- you know, Agent Jarrow did A, B, and
3 C. This is what happened. Agent Jarrow -- and this is how he
4 resolved the issue, or this is how the secret service resolved
5 the issue, then we can move from there. I think that that
6 would be the next step.

7 THE COURT: Ms. Choi?

8 MS. CHOI: I mean, I think, again, we're getting ahead
9 of ourselves.

10 THE COURT: But I think I just want agreement as to
11 what the process will be.

12 MS. CHOI: Sorry. If?

13 THE COURT: So you're going to make these inquiries
14 and you'll report back --

15 MS. CHOI: Whatever new information comes of it. If
16 there is no new information, I guess is that the question
17 that's on the table?

18 THE COURT: I mean, well, Mr. Creizman said, well, at
19 least we'll learn Agent Jarrow, for example, what, didn't --
20 you know, these are the steps he took, and no new information
21 was learned.

22 MS. CHOI: Right. We can say that.

23 THE COURT: Okay.

24 MR. CREIZMAN: Right. But what I feel right now is
25 that there is a lack of information, there's a void. Meaning,

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1 we will have new information because we will know what Agent
2 Jarrow did --

3 THE COURT: Okay.

4 MR. CREIZMAN: -- and what the secret service did.

5 MS. CHOI: Your Honor, I would like to make that, you
6 know -- that's fine. We'll deal with this.

7 THE COURT: So we'll get that, we'll learn what we
8 learn, and then we can take up what, if anything, can be done
9 with it. All right. Thank you.

10 That's the application that came in last night. For
11 the purposes of the charge, it goes to -- I mean, I suppose the
12 government could give its position -- you know, let's put it
13 this way. If the government and its investigative techniques
14 are in issue as part of the defense here, what then is an
15 appropriate alteration to that charge or exclusion of that
16 charge? And to be clear --

17 MS. CHOI: It's page 76, your Honor.

18 THE COURT: Thank you. I mean, I guess we know at
19 this point, no matter what, that part of the defense is to --
20 in light of the facts already in the record -- that part of the
21 defense is --

22 MS. CHOI: Yes, your Honor. To undermine the
23 integrity of the investigation. Even in circumstances where
24 that's the case, we still get the instruction as you have laid
25 out in instruction number 53 for the simple purpose that, this

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1 instruction simply says that there's no requirement that the
2 government has to use a particular type of technique, and that
3 they shouldn't speculate about which type of techniques the
4 government used. That is a separate question from whether or
5 not the defense can argue the government's investigation writ
6 large is problematic, which happens many different cases
7 where -- including trials that I've had -- where this still
8 applies.

9 THE COURT: And I've often had fighting over this
10 language so I don't want to -- I don't want to pretend it's
11 never uncontroversial.

12 But the specific language that they've raised and that
13 stands out is "law enforcement techniques are not your
14 concern". That seems to me confusing to the jury in light of
15 what is --

16 MS. CHOI: I think or -- so you would just get rid of
17 that one line that says "law enforcement techniques are not
18 your concern"? I don't think -- that's fine.

19 THE COURT: I mean, I think -- let me just read the
20 whole thing. So maybe striking -- I mean, the points are that,
21 "The government doesn't have to prove its case through any
22 particular means."

23 MS. CHOI: Correct.

24 THE COURT: "You're not to speculate as to why the
25 government used techniques it did or why it didn't use other

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1 techniques." So why it did not use other techniques I suppose
2 if techniques includes -- I think there's probably an edit that
3 kind of gets to the primary points without suggesting that the
4 jury shouldn't consider something that isn't, by everyone's
5 agreement, in evidence and in issue. All right?

6 MS. CHOI: Maybe I have a different view of what
7 "techniques" means. I'm just confused as to --

8 THE COURT: There might be. I've had fights over
9 that, too.

10 "You've heard reference to the questioning to the fact
11 that certain investigative techniques were used or not used by
12 the government."

13 I mean, the way this often plays out, right, is, well,
14 you didn't --

15 MS. CHOI: Get DNA.

16 THE COURT: -- yes, you didn't get DNA, you didn't
17 make it look like a -- what's the show? CSI --

18 MS. CHOI: CSI.

19 THE COURT: -- lab. That's out of concern that the
20 jurors have some vision of how you prove certain things.

21 MS. CHOI: Right. And your Honor, just to be clear, I
22 think that that issue may still arise. That issue may still
23 arise, depending on what -- as we've noticed defense counsel
24 and the Court on what the direct testimony will be and the
25 cross examination of Mr. Lebedev in particular.

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1 THE COURT: I think that might be right. Let me just
2 say that I have no experience of a trial in which in evidence
3 is the fact that a government agent suggested that a
4 cooperating witness extract money from a company under
5 investigation.

6 MS. CHOI: Fair enough.

7 THE COURT: So as a result of that fact, I think we
8 need to tailor this instruction to what the defense might
9 justifiably argue from the evidence.

10 MS. CHOI: So I think if you just got rid of the
11 sentence on line 7 that your Honor had identified, and then it
12 limits what they're supposed to consider as -- or it limits --
13 sorry -- what they're not supposed to speculate about to why
14 this and not that, but eliminates the question of, generally
15 speaking, whether or not they can call into question the
16 integrity of the government's investigation. I think that's
17 fine.

18 THE COURT: Mr. Creizman, do you have a response?

19 MR. CREIZMAN: I think if we started on line 4, "While
20 you are to carefully consider the evidence introduced by the
21 government," until through line 7, "law enforcement techniques
22 are not your concern."

23 THE COURT: So you would have the first two sentences,
24 "You've heard reference."

25 MR. CREIZMAN: Yes.

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1 THE COURT: "There's no legal requirement that the
2 government prove its case through any particular means." And
3 then, "Your concern is to determine whether on the evidence or
4 lack of evidence the defendant's guilt has been proven beyond a
5 reasonable doubt."

6 MR. CREIZMAN: Yes.

7 THE COURT: What do you think, Ms. Choi?

8 MS. CHOI: I think that's fine, your Honor.

9 THE COURT: All right. I agree. Thank you.

10 So we'll make that edit to this instruction, because I
11 think that captures the way in which legitimately the jury
12 should be informed and doesn't confuse them by telling them
13 they shouldn't concern themselves with something that is or may
14 be an issue. All right?

15 Then that resolves Mr. Creizman's motion, and we'll
16 wait to hear from the government with any additional
17 information.

18 Next. What's next?

19 MS. CHOI: Dream Host, your Honor.

20 THE COURT: Yes. My basic read following the briefing
21 on this issue is that the points that Ms. Santillo is making on
22 behalf of Mr. Gross are weight points. They go to the weight
23 of the evidence. So my concern, though, is how does Mr. Gross
24 make those weight points in a way that doesn't send us off on a
25 403 tangent? How does Mr. Gross have the ability to make the

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1 points -- which seem to me readily available. I mean, there
2 are things like that Mr. Gross' response was "here are the
3 active accounts", and the like. There's additional points that
4 they want to make with respect to this.

5 MS. CHOI: One moment, your Honor.

6 (Pause)

7 MS. CHOI: Your Honor, he can still make those
8 arguments. I mean, the way that we see this happening is
9 through the testimony of a witness that we've noticed, Terry
10 Adams, who is the person who was the one who sent the
11 conservatorship order to Mr. Gross that says "all records", and
12 then again reiterated "all email accounts", and that was the
13 individual to whom Mr. Gross responded to say "all active email
14 accounts", or "these are the active email accounts" and do the
15 sublist of the email accounts relating to HOPE FCU.

16 So that would be the first witness. And obviously,
17 they can cross him on and get that point in that you didn't go
18 back to him and ask those questions. So they can make the
19 weight point through him.

20 And then we also have a witness from Dream Host who
21 will say, in fact, they were all active accounts as of October,
22 2015, and that we anticipate that this is what he would say,
23 and that even as of March -- the only time in which Mr. Gross
24 would not have seen those particular email accounts when he
25 logged into Dream Host would have been as of March after his

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1 arrest when he turned off the domain for HOPE FCU. But until
2 that point, it's his understanding that, since the data still
3 exists here as of February, 2017, that he would have seen that
4 those email accounts existed when he logged into the back end
5 of Dream Host.

6 So I think you can make both of those points. If
7 Ms. Santillo wants to make the point, well, you know, probe him
8 on what Mr. Gross would have or would not have seen, she could
9 also make that point through the Dream Host witness, but I
10 think that those two witnesses would provide them ample
11 opportunity to make their weight arguments.

12 MS. SANTILLO: Can I see 3500 material?

13 MS. CHOI: No, because he's coming and -- he's going
14 to get on the red eye and we'll talk to him and then we'll give
15 you the 3500. But this is the conversation I had yesterday.
16 You're right, I haven't turned the 3500 on that one question.
17 We were waiting to see if we could even call the Dream Host
18 witness.

19 MS. SANTILLO: Your Honor, my biggest concern here is
20 this failure of opportunity to cure the moment. I feel like
21 they're creating this specter that he wasn't being responsive
22 when they could have replied in the email and just said "give
23 us the inactive accounts", too. I mean --

24 THE COURT: But I don't understand why that's not a
25 cross examination for Adams then.

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1 MS. SANTILLO: Because it's so irrelevant and then we
2 have to chiro --

3 THE COURT: That what's so irrelevant?

4 MS. SANTILLO: This little point that they're trying
5 to make. The fact that these accounts still exist, they could
6 have just asked him for it, and now they're going bring a
7 forensic expert, and now we're going to have to bring a
8 forensic expert. We haven't even gotten the 3500 material.
9 Our case starts on Tuesday. I mean, this is --

10 THE COURT: You keep saying "the forensic expert", but
11 just in response to what was said --

12 MS. SANTILLO: Well, I don't know -- without having
13 seen any of the 3500 material, how am I going to know how he
14 viewed the screen to see if it was active or inactive? How am
15 I going to know, you know, whether he has worked for those
16 people? You know. I don't know the answers to those questions
17 about how their system works.

18 MS. CHOI: Your Honor, to be clear, we don't have the
19 answers to those questions, either. The question I posed was,
20 "Could a user have seen all the email accounts that were active
21 as of October, 2015?" And he said, "Yes, that these would have
22 been active accounts because the domain had not been shut
23 down."

24 That's literally -- that's the extent of our
25 conversation, and he's flying in so that we can have a further

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1 debrief with him. But those questions about, well, what did he
2 look at, what would he have looked at, the difference between
3 active or not active, are all of the questions she could pose
4 of her client, and she can inquire of that particular witness
5 on the stand.

6 But if the question is, you don't know what the
7 3500 is, well, that's literally the five-minute conversation I
8 had with him yesterday and I've proffered it. I think all
9 those arguments go to weight. It is not a collateral question.
10 When Mr. Gross understands that his whole -- that the whole
11 dance is up, as it were, and he is served with an order of
12 conservatorship that said "all records" and sent again an email
13 for all email accounts, and he does not produce that full
14 amount, all those emails -- all the email addresses for which
15 there was data at the time, that is a material fact that goes
16 to his state of mind, his culpability, his understanding that
17 there would be a problem if they were to look through all those
18 email accounts, and that's precisely why they're arguing about
19 this.

20 MS. SANTILLO: Your Honor, that is not precisely why
21 I'm asking about this, I'm asking about it because it's wholly
22 unfair to go back in time to make that kind of argument when --

23 THE COURT: I mean, the trials are only about going
24 back in time.

25 MS. SANTILLO: Well, literally within that call he

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1 asked for clarity. And at the time --

2 THE COURT: But nothing precludes you from making
3 those points to the fact finders. So I'm sympathetic and,
4 frankly, I would do anything that I could to reduce the number
5 of witnesses in this trial, but it's relevant evidence. The
6 arguments that you're making are cross points, they're good
7 cross points, you have the means to make them.

8 And I should say, I'm exaggerating when I say I would
9 do everything I could. As you know, just genuinely -- I'm
10 serious, I'm genuinely concerned about the length of trial. If
11 I thought there were a basis to exclude the government from
12 doing this, I would. But it's relevant evidence, it's not --
13 I've explored, because it concerned me, that it would be a
14 sideshow to prove up what they're saying can be proven up from
15 this. Based on what's been proffered to me and based on
16 everything that I've gotten in opposition, it's not. What I
17 keep hearing from you, Ms. Santillo, are perfectly legitimate,
18 and in many ways effective, cross examination points. To the
19 extent you have a basis or need to bring in, I don't know, some
20 additional witness based on something which you haven't
21 proffered to me yet as to why it isn't true what they're
22 saying, which is this is the request, this is the response, and
23 then the person who understands something about hosting this
24 material can say he gave a subset of what was available, you
25 can cross on that point, you can introduce a different witness,

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1 if there's one that exists who knows something about this
2 system that's different. I mean, I don't know -- I don't know
3 what a generic forensic expert would do. I mean, it seems to
4 me it's what's in issue in this system. But I just -- I've
5 given you multiple opportunities to make an argument other than
6 there are counterpoints to be made. There are counterpoints to
7 be made, I will allow you fully to make them, but I can't
8 preclude relevant evidence for no reason.

9 MS. SANTILLO: Your Honor, I would just note that
10 since I haven't seen the 3500 material, that's why I can't make
11 a representation about what would be required to rebut it.

12 THE COURT: So you've had a proffer as to what it will
13 be, but let's nail this down. When will existing and
14 soon-to-be-made 3500 material be produced?

15 MS. CHOI: I can give her the three lines of notes
16 that I had from yesterday, I just didn't know we were going to
17 go down that road. He's flying in tonight on a red eye. When
18 I meet with him, I can turn them over as soon as I have them,
19 but we haven't had a full debriefing on this question.

20 THE COURT: You haven't had a full debriefing on what
21 question?

22 MS. CHOI: I haven't done a Q and A with him. So as
23 it presently stands, the things that I know about this issue
24 from him, from Mr. Frye, his name is Carl Frye, the things that
25 I know about them have been fully disclosed. I'll give you the

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1 handwritten notes that are essentially the same thing.

2 She knows about the emails that Terry Adams has
3 because those are the emails that we put on as part of our
4 exhibits on the -- when this whole issue came up, which is when
5 they accused us of spoliation, which is how we got to where we
6 were. When they made that spoliation argument, we found all
7 the other emails while we chased it down and we pieced it
8 together.

9 THE COURT: And just without, remind me when that was?

10 MS. CHOI: Weeks now. I mean, that was during the
11 motions in limine practice.

12 MR. NOBLE: Like a week or two before trial.

13 MS. CHOI: Week or two before trial. She had all
14 those emails then because we had produced them as exhibits to
15 our motion in response to her accusation that we had spoliated.

16 MS. SANTILLO: And indeed, a lot of emails are gone,
17 but that's beside the point.

18 THE COURT: But I don't understand.

19 MS. SANTILLO: Ironically, every email that Pastor
20 Gross did give control to the NCUA to, all of those emails are
21 gone. It's only the emails that he didn't give access to that
22 are still here. So it's not even like they never had access to
23 the stuff. He never destroyed them.

24 THE COURT: You made that point in your papers. I
25 don't see what that has to do with this.

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1 MS. SANTILLO: I was responding to her spoliation
2 point.

3 I do have one concern, and that is that I feel like
4 there has been a suggestion yesterday, and including in front
5 of the jury, that it's the defense that is wasting time in this
6 case, and that as we get to --

7 THE COURT: Well, listen. I've been -- A, I've
8 treated everyone the same in front of the jury as to time. And
9 I've been very cautious about making sure my concerns about
10 that are expressed outside of the ears of the jury.

11 I think the one instance that you're pointing to was
12 when specifically you, despite my having said previously I
13 don't want lawyers saying in front of the jury -- I said this
14 expressly -- I don't want lawyers saying in front of the jury
15 "why don't we take a break now, Judge", because I don't like
16 the dynamic that creates where a lawyer is trying to get -- I'm
17 not saying that's what you were doing, that's the perception --
18 get on the good side of the jury, you did that despite my
19 direction not to, and I get that it's unintentional, but you
20 did it. I then said, no, keep going, because I wasn't ready
21 for a break yet. As the schedule as I had developed it, it
22 would have been another ten minutes before a break.

23 Nevertheless, I said proceed -- I told you to proceed.
24 There was then, I don't know how long, but a long gap in which
25 you were looking for something and not finding it. And I said,

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1 "You know what? We'll take a break because this is wasting
2 time."

3 MS. SANTILLO: Yes.

4 THE COURT: And that is the only inclination of me
5 pressing the defense to move faster, and I have pressed the
6 government to move faster. So with that clarity, you may
7 proceed.

8 MS. SANTILLO: Okay. And I understand that was a
9 unique situation, and I was not able to find the document after
10 our exchange as quickly as I could have. However, afterwards,
11 there was also a suggestion by the government that somehow the
12 schedule was running long because our crosses were long.

13 THE COURT: That is not in front of the jury.

14 MS. SANTILLO: That was not in front of jury, but what
15 I'm worried about is, going into next week and having our
16 defense case on and having artificial time pressure put on us
17 when we had to sit through days and days and days of testimony
18 that --

19 THE COURT: There will be no -- I can assure you,
20 there will be no artificial time pressure put on the defense.
21 I mean, I will guard against it.

22 Now, I have a schedule to protect, and I've been
23 riding the government as hard as I possibly can on this. I
24 have not said a peep to the defense. In fact, I said to the
25 contrary, I said you've been efficient in your cross

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1 examinations, they've been some of the most efficient and
2 targeted cross examinations I've seen from both defense
3 counsel. It's the only reason I think that we're, you know,
4 that we're on -- we have a hope of finishing within time. So I
5 have not suggested anything -- I don't think, tell me if I'm
6 wrong -- that would tell the defense that they don't get to put
7 on their case.

8 MS. SANTILLO: I just wanted to raise the concern in
9 light of the fact that we may now two kind of technical experts
10 next week that we weren't planned.

11 THE COURT: I share that concern. You'll get to
12 respond. I mean, the government is going to have to make
13 choices, as I've made clear. I want the government to close
14 tomorrow. Not tomorrow --

15 MS. CHOI: Monday.

16 THE COURT: I do, actually.

17 MS. CHOI: Not close. I you mean rest, your Honor,
18 not close, but rest.

19 THE COURT: In my wildest hopes and dreams. I've been
20 doing whatever I can and will continue to do what I can, and I
21 think the government knows that they've got very little wiggle
22 room in terms of their continuing presentation in terms what
23 I'm going to allow with the summary witness and the like, and
24 it is a concern, but that won't affect your ability to counter
25 this evidence. You will have it. And we'll deal with it as it

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1 comes.

2 And you've indicated the time you might need for the
3 defense case. It's why I'm concerned -- you know, given where
4 we are in the schedule, it's why I want the government to
5 finish Monday -- to rest Monday, to make sure we can be done
6 next week, which is what we told the jury.

7 MS. CHOI: Yes, your Honor. And I think, again, I
8 think your Honor appreciates that we've been efficient about
9 the way in which we've done our presentations. We haven't been
10 publishing as many exhibits as perhaps we would have liked to.

11 I have placed your Honor on notice that there will
12 have to be some exhibits that we have to publish to give sort
13 of a frame of reference with regard to the bank and wire fraud
14 charges against Mr. Lebedev. We intend to streamline all of
15 the government's witnesses.

16 But again, I reiterate, your Honor, I think Tuesday is
17 the realistic possibility. I don't want your Honor to be under
18 some other assumption with regard to that. We have cut
19 something like eight or nine witnesses off of the list of the
20 one that defense counsel has had from the getgo. We are
21 cognizant of that.

22 But your Honor knows, we have the burden, so we're
23 trying to work very hard to strike the correct balance between
24 making sure that we get the evidence that we need in, to argue
25 for purposes of the closing, but also not to be -- not to

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1 somehow have a situation in which we're precluded from
2 introducing evidence that we think is crucial to our case.

3 THE COURT: Well, within reason. And part of the
4 reason that we're operating in is the schedule.

5 MS. CHOI: I understand, your Honor.

6 THE COURT: Ms. Santillo is 100 percent right. What
7 we're not going to do is let you dot every I and cross every T
8 that pushes us into the fourth week.

9 MS. CHOI: I understand, but I will say this. We may
10 have to get to the fourth week even if we are as efficient as
11 possible with regard to Monday and Tuesday, and it's an
12 unfortunate -- it's unfortunate that we found ourselves in this
13 situation, but I think it's the reality. If there are a series
14 of defense witnesses, which we still have not received notice
15 of who precisely that will be -- that could take up one to two
16 to three days of next week. And then I would presume your
17 Honor would want us to have all of our closings -- all of our
18 summation on one day and then charge the jury. I don't think
19 it's --

20 THE COURT: Well, whether it's one or two days, we're
21 not wasting any time.

22 MS. CHOI: Understood.

23 THE COURT: So the moment everybody rests --

24 MS. CHOI: Right. And again, there may also have to
25 be a rebuttal case, depending on what the defendants do,

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1 because we just don't know what that is. So we're working very
2 hard, I just don't want to catch everyone by surprise that
3 there may be a government rebuttal case, which we've always
4 said may be at issue, and that that may mean that we spill into
5 that next week, depending.

6 THE COURT: Well, I think what we can do now is, given
7 what the government's representations at the beginning were
8 about the length of the case, I think you need to really work
9 hard. And, you know, places where I see -- I mean, I don't
10 know what you plan for the summary witness, but it's not going
11 to be summation.

12 MS. CHOI: No, it's not.

13 THE COURT: It's not going to be repetition of
14 anything that we've seen, and it's not going to be mindless
15 reading of items that are in evidence. Because --

16 MS. CHOI: No, your Honor. These are documents they
17 haven't seen yet. They haven't seen the tracing analysis at
18 all. It's a very streamlined tracing analysis with regard to
19 the proceeds of all of Kapcharge and Collectables Club's
20 transfers of money and funds to the defendant and his church,
21 and then a very quick synopsis of the Coin.mx bank accounts.
22 Very, very short, just to sort of explain the total amount of
23 funds that have gone through, and then a location analysis,
24 which the defendants have all been on notice about, but where
25 was Anthony Murgio during these times in the Southern District

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1 and elsewhere, and where was Trevon Gross during these
2 following times in the Southern District and elsewhere, to
3 address their venue argument, because clearly that's one of the
4 cruxes of their defense.

5 (Continued on next page)

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1 THE COURT: It is an available defense.

2 MS. CHOI: Yes, your Honor. But I'm just saying
3 that's why we have the location analysis, which they have been
4 placed on notice of, because they have an earlier draft of what
5 this situation will be, and we're mindful of this. We're
6 cutting a lot of slides that we would otherwise want to
7 introduce, but we're not going to be repetitive about what we
8 do.

9 MS. SANTILLO: Could we have access to the latest --

10 MS. CHOI: Yes, we're going to produce that later
11 today. We don't have the finalized version yet, but we'll
12 produce the ones that we've got.

13 On that happy note --

14 THE COURT: Just to be clear, I do try to let people
15 try their cases, I really do, but it's a very short -- for the
16 time remaining on the government's case, it's a short leash,
17 and it will be nonduplicative, entirely nonrepetitive, and
18 concise information because based on representations that
19 everybody made, the jury's expectation is that we finish by the
20 end of next week. And I'm not going to in any way shorten what
21 the defense needs to do.

22 MS. CHOI: Of course not.

23 THE COURT: The only wiggle room that remains is,
24 after three nonfull weeks, but three weeks of the government's
25 case, with very disciplined cross-examination, the government's

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1 time is limited.

2 MS. CHOI: No, we understand, your Honor. And I hope
3 the Court appreciates we understand that, and that we have been
4 working very diligently. I don't think the NCUA examiner has
5 been duplicative. We've narrowed the scope of a lot of the
6 witnesses to make sure we hit the high notes. So, that's where
7 we are.

8 That being said, it would be -- I think today is
9 Friday, so I just wanted to know whether or not we would be
10 getting defense 3500 a list of the witnesses they intend to
11 call, exhibits, any expert witness disclosure. And, also, we
12 have served both defendants with if-as-when subpoenas relating
13 to whether they take the stand and when we can anticipate
14 getting documents that are responsive.

15 THE COURT: Mr. Creizman?

16 MR. CREIZMAN: Well, I first just want to remind the
17 Court that in terms of the timing of the trial, I did raise a
18 Rule 29 motion that the government defaulted on, and I
19 reiterate that motion again, and that will save a lot of time
20 for next week.

21 On the second point --

22 THE COURT: For the record, he's joking.

23 MR. CREIZMAN: Yes.

24 THE COURT: For the record, it's not funny.

25 MR. CREIZMAN: Yes, for the record.

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1 In terms of our witnesses, we've disclosed to the
2 government a potential witness being -- we've disclosed the
3 possibility of Yuri Lebedev testifying, although I think that
4 that is becoming more and more remote. Very, very remote.

5 THE COURT: Who is the potential witness you've
6 disclosed?

7 MR. CREIZMAN: His name is Khang Trang, K-h-a-n-g,
8 Trang, T-r-a-n-g. He's a developer and works for, I think, the
9 Murgio web of companies. He's a technology guy. But we
10 haven't spoken to him yet. We intend to interview him today
11 and turn over our reverse 3500 on that witness.

12 And, of course --

13 THE COURT: So that will be turned over today?

14 MR. CREIZMAN: Yes. And then potentially take Jarrow.

15 We also intend to turn over certain exhibits that we
16 intend to try to introduce in the defense case. Although I
17 think that some portions of like WhatsApp, or emails, or, you
18 know, Gchats, those type of things, we're going to have to give
19 them on Saturday or Sunday just because it's --

20 MS. CHOI: That's fine, your Honor. And I think,
21 also, again, we were going to place the defense on notice again
22 that we were going to be giving a long list of the outstanding
23 government exhibits on the government exhibit list that we
24 haven't introduced yet that we'd like to have introduced in one
25 list, hopefully with the Court exhibits, so they don't have to

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1 sit there.

2 THE COURT: You promised me that by doing Court
3 exhibits in the beginning --

4 MS. CHOI: I know it hasn't quite worked out that way,
5 but we'll do it for Monday, your Honor.

6 THE COURT: So potentially Trang, potentially
7 Mr. Lebedev, but that seems less likely, and Agent Jarrow, to
8 the extent that that issue continues to present?

9 MR. CREIZMAN: Yes, your Honor.

10 MS. CHOI: Your Honor, to be clear, does he want
11 Special Agent Jarrow for anything other than the Beyer
12 question?

13 MR. CREIZMAN: No.

14 MS. CHOI: Okay.

15 THE COURT: Thank you, Mr. Creizman.

16 Ms. Santillo?

17 MS. SANTILLO: Well, there's been some flux with
18 respect to the defense witnesses, but at this moment, depending
19 on the outcome of her consultation with counsel, we would
20 anticipate calling Loretta Larkins, who the government has
21 already met with, and we can provide reverse Jencks for
22 tomorrow, and then possibly Mr. Gross, no decisions have been
23 made, and then some character witnesses, who were not on the
24 list. We also plan on introducing exhibits, and we can provide
25 a cut of that on Sunday.

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1 THE COURT: Character witnesses, how many, and who are
2 they?

3 MS. SANTILLO: I think, at this point, we have a
4 couple of names, and we're going to be interviewing them to cut
5 them down, but there's only going to be about three.

6 MS. CHOI: Your Honor, we'd just like to know who they
7 are.

8 MS. SANTILLO: When I know, I will disclose them. And
9 we plan on having a call about it in the afternoon.

10 MS. CHOI: If she's reluctant to give us the actual
11 names of those individuals, could we at least get a proffer as
12 to in what bucket of people they might be, like churchgoers or
13 whoever else?

14 MS. SANTILLO: Well, your Honor, our case has changed
15 very much over the last couple of days based on the fact that
16 all the board members who were going to testify who have
17 knowledge of Mr. Gross and his character are no longer going to
18 be available to us. So we are regrouping and trying to find
19 the right character witnesses who don't have connections to the
20 case.

21 THE COURT: Well, I think at some point, we've got to
22 know who they are.

23 MS. SANTILLO: And we will, by this afternoon. It's
24 only been in the last three days that we learned that they're
25 not calling any witnesses from HOPE, and that suddenly Loretta

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1 Larkins has exposure, and so --

2 THE COURT: So you wouldn't use the HOPE witnesses as,
3 in part, character witnesses? Is that the idea?

4 MS. SANTILLO: It was the idea.

5 THE COURT: All right.

6 MS. CHOI: Later today is fine, your Honor.

7 THE COURT: Thank you, Ms. Santillo.

8 MR. CREIZMAN: Your Honor, Ms. Madrigal apparently is
9 very shy. I'm asking you if she can be excused for the day?

10 THE COURT: Yes.

11 MS. MADRIGAL: Thank you, your Honor.

12 THE COURT: Okay.

13 So it sounds like we have our basic sense of the
14 potential defense case and a schedule for disclosures; is that
15 right?

16 MS. CHOI: Yes, your Honor.

17 THE COURT: Okay.

18 What does that leave?

19 MS. CHOI: We can go through the rest of the witnesses
20 for the government again, if your Honor wants to know, but I
21 think it's the same as what we had said before.

22 THE COURT: We're finishing with McDonough?

23 MS. CHOI: Finishing with McDonough, Terry Adam from
24 the NCUA, and then --

25 THE COURT: Hang on, hang on.

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1 MS. CHOI: Okay.

2 THE COURT: Okay.

3 MS. CHOI: I think our longest remaining witness would
4 be Terry Adam. Then we have Christian Wilson from First Data,
5 the payment processor, and we'll be publishing the subsection
6 of the documents that are relevant to establish its relevance
7 with regard to Mr. Lebedev. We're trying to narrow the scope
8 of Chase witnesses. We're trying to get it to as short as
9 possible and not overlapping items with regard to the bank and
10 wire fraud victims in this case, or at least one example of
11 them.

12 And then we have the DreamHost witness, Carl Frey; the
13 IRS witness on the question of disclosures to Trevon Gross --
14 by Trevon Gross to the IRS; and then the summary witness --

15 THE COURT: Who is the IRS witness?

16 MS. CHOI: Rose Linton, L-i-n-t-o-n.

17 THE COURT: And then who is the last one?

18 MS. CHOI: And then the last person is John Rollins
19 from RSM. It's a summary witness. He is a forensic accountant
20 who has gone through the financials to establish where the
21 money went, which I think is clear from our other
22 representations about what his testimony will be.

23 THE COURT: Did you hear that, Mr. Noble?

24 MR. NOBLE: Yes, Judge.

25 THE COURT: Because that was for you and not me, the

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1 last piece there.

2 MS. SANTILLO: With respect to Mr. Rollins, do we have
3 all the information we're going to get on his background?

4 MS. CHOI: We are going to produce it all -- we will
5 produce all of the 3500 to you today. He has a resume that
6 will be in there that you can take a look at. And the backup
7 charts, we can give you the tracing as well.

8 All the underlying exhibits, obviously, have been
9 disclosed for many, many moons, and they're marked as
10 government exhibits.

11 THE COURT: But you'll do what you just indicated --

12 MS. CHOI: Today.

13 THE COURT: Okay.

14 And how long do you anticipate for Adam?

15 MR. NOBLE: Probably about an hour, hour and a half,
16 Judge.

17 THE COURT: I know you bear the brunt of most of this,
18 Mr. Noble, but literally, I don't want them to even say what
19 the NCUA is, I don't want a single repetitive question. The
20 jury --

21 MR. NOBLE: The only thing I'm going to ask about the
22 NCUA is what branch of government it's in, because that has not
23 yet come out. And then I won't even ask him about his training
24 or anything like that. We'll move straight to the various
25 portions of his substantive testimony, which, your Honor, these

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1 witnesses, we chose because they kind of cover the
2 chronological spectrum of the conduct, and Mr. Adam's testimony
3 is limited to stuff that happened in 2015. He will pick up,
4 basically, where Brian McDonough and Meg Flok left off, but his
5 testimony will be not so much chronological as opposed to
6 topical, and he will just cover his knowledge of the various
7 relevant topics, like Kapcharge, ACH processing, the loans, and
8 then what happened in the conservatorship with respect to the
9 email issue. Now that your Honor is going to allow us to put
10 that in, he'll testify about the email exchanges he had with
11 Mr. Gross and some other points on conservatorship. So those
12 are kind of the basic topics. I won't ask any background stuff
13 about the NCUA.

14 THE COURT: No defining terms that they've already
15 heard.

16 MR. NOBLE: Stripped out.

17 THE COURT: Obviously, because of the introduction of
18 the email issue and the DreamHost, they get to cross-examine on
19 those issues, and --

20 MR. NOBLE: Hundred percent.

21 THE COURT: -- I'll give them all the time they want
22 to do that, but all the more reason that you've got to keep
23 everything pared down.

24 MR. NOBLE: I will, Judge.

25 THE COURT: And then how long for Rollins?

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1 MS. CHOI: We're cutting the deck, so we're going to
2 make it as tight as possible. I just don't have an estimate
3 because we haven't gone through it in the testimony --

4 THE COURT: More than an hour or less than an hour?

5 MS. CHOI: More than an hour, I think. Yeah, I think
6 it's going to have to be more than an hour, maybe a couple of
7 hours at most. But the rest of these witnesses, the Chase
8 witnesses, if I don't have them on and off quickly, I'd be
9 shocked.

10 We'll see if we can reach stipulations as to some of
11 the stuff with Mr. Creizman. It would mean that we wouldn't
12 have to call multiple Chase witnesses because part of the
13 problem is that they have people who know the debit side and
14 people who know the credit card side, and so it may be the case
15 that we could work something out with Mr. Creizman since it
16 really doesn't implicate Mr. Gross to narrow the scope, and
17 we're optimistic that once we have our exhibits marked this
18 weekend, we can reach that type of resolution.

19 MR. CREIZMAN: Okay. I'll be around.

20 THE COURT: Thank you.

21 No, I think that would be helpful. Even short
22 witnesses, if we don't need to go through the whole rigmarole.

23 Obviously, Mr. Creizman, you make your judgments. I'm
24 not pressuring on the defense side, the pressure is on the
25 government side.

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1 MS. CHOI: I would say other than -- Mr. Wilson will
2 be more substantial just because he has to explain the payment
3 processing world to some extent, sort of similar to what
4 Ms. McDowell had to do with the ACH processing, but it will be
5 short. And then --

6 THE COURT: Wilson is from where?

7 MS. CHOI: First Data, which is, just so your Honor
8 understands, the sort of entity that sits between merchants who
9 want to process credit card transactions and the banks that
10 have issued the credit cards that were used in those
11 transactions. They transmit the data back and forth. So,
12 they're the ones who can tell you what has been transmitted.

13 MR. CREIZMAN: Are they called ISOs?

14 MS. CHOI: No, they are not called ISOs, but they have
15 ISOs.

16 MR. CREIZMAN: Okay.

17 THE COURT: So he worked a little discovery in there.

18 MR. CREIZMAN: I have to go back to the books. I
19 thought --

20 MS. CHOI: You have books?

21 MR. CREIZMAN: Well, I had another trial.

22 MS. CHOI: Oh, I see. Okay. Yes, this is not
23 complicated, but it's also new territory for the jurors, so
24 there needs to be a little background on him. He'll be a
25 little longer. I'm hoping once he sets the stage, the Chase

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1 witnesses can just say these are the docs --

2 THE COURT: What do you estimate for Mr. Wilson?

3 MS. CHOI: An hour, maybe, at most. I'm going to try
4 to pare it down.

5 THE COURT: McDonough is on cross, right, so almost
6 done?

7 MS. CHOI: Yes. Ten minutes, I think.

8 THE COURT: Ten minutes? Okay.

9 Who is the Chase witness?

10 MS. CHOI: Part of the issue is that we need to
11 potentially call two, unless we can stipulate out, because they
12 have records from the credit card side and records from the
13 debit card side, and they're separate Chase entities. So I'm
14 hoping that if I can work with Mr. Creizman -- their testimony
15 will be similar. I'm just hoping that we can work out a stip
16 as to one or the other, and then have the other one explain
17 sort of what information they get as an exemplar as it were.

18 THE COURT: How long do you think for Frey?

19 MS. CHOI: It's very short. 30 minutes, maybe, maybe.
20 I don't even think. And Rose Lipton will also be very short
21 because it's literally this is the information you see here,
22 what's missing.

23 THE COURT: Well, it seems to me if you can keep
24 paring down on Terry Adam and Rollins, I have a faint hope of
25 the government resting on Monday, and I'm going to keep that

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1 hope.

2 MS. CHOI: Hope springs eternal, your Honor.

3 MS. SANTILLO: Your Honor, I wanted to address the
4 Terry Adam issue --

5 THE COURT: Yes.

6 MS. SANTILLO: -- especially in light of the motions
7 that we have been filing with respect to the indictment in this
8 case, and the scope of the alleged conspiracy, and the fact
9 that -- I feel like there's a real danger in this trial that
10 the government is trying to move that Mr. Gross was engaging in
11 negligent ACH processing and not the conspiracy that's been
12 charged in the indictment. The whole scope of Mr. Adam's
13 testimony is from 2015, after he no longer had any relationship
14 with the Collectables Club. It's cumulative, it's prejudicial.
15 There's nothing illegal about ACH processing. There was no
16 unlawful purpose or -- and certainly not one that was charged
17 in the indictment, that is being established by this repetitive
18 evidence.

19 I just want to raise the issue because we have already
20 started briefing all of this stuff, and I think tomorrow, this
21 witness is focused exclusively on 2015, and Kapcharge, and ACH
22 processing.

23 THE COURT: Monday.

24 MS. SANTILLO: Monday.

25 THE COURT: I will have briefing in advance of that,

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1 but I hear you.

2 MS. CHOI: Your Honor, just to be clear, I think your
3 Honor understands the relevance of this, especially given the
4 indictment has this time scope into 2015. So this is all
5 relevant behavior. Your Honor has already ruled that it's
6 not -- our claims are not that the negligence is what causes
7 the criminal liability. The problem is the government
8 establishing that he has corrupt intent. Running his credit
9 union to the ground through voluminous ACH processing into 2015
10 while he's making false statements to the NCUA about the status
11 of whether he stopped that ACH processing goes directly to his
12 corrupt intent.

13 And I think we are working hard to narrow what we
14 establish on that front, but this is not a case about negligent
15 ACH processing, it's a case about misstatements that her client
16 made to the NCUA to cover up the fact that he was running his
17 credit union in a way that was not safe and sound for the
18 benefit of Kapcharge.

19 MS. SANTILLO: That's also not in the indictment.
20 This is about a bribe that took place in June 2014, and all the
21 evidence from 2015 is being introduced to show that in 2014,
22 when he didn't know that anything was going to happen with
23 respect to ACH processing, that he's corrupt. So they're
24 trying to trace back his corrupt intent from June 2014 to
25 something that he did in 2015 that is not illegal, was with a

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1 totally different party, and is not within the scope --

2 THE COURT: How does that deal with the misstatements
3 and obstruction of the NCUA investigation?

4 MS. SANTILLO: Because if you read our papers and the
5 indictment, it's very clear in the indictment that the only
6 misrepresentations that are charged are with respect to the
7 Collectables Club coming onto the board, and with respect to
8 the field of membership, and with respect to the health in
9 terms of shielding the fact that the Murgios and the other
10 members of the Collectables Club were on the board. That's the
11 scope of the conspiracy that is alleged in the indictment. And
12 once they severed ties, Mr. Gross, HOPE FCU, and Kapcharge
13 entered into an entirely separate business relationship where
14 there was no change in control of the board, and their unlawful
15 purpose had nothing to do with Bitcoins, had nothing to do with
16 Coin.mx, had nothing to do with the Murgios, it only had to do
17 with processing ACH transactions.

18 THE COURT: Well, I guess one question is: Are
19 there -- well, go ahead, Ms. Choi.

20 MS. CHOI: Yes, your Honor. Just to be clear,
21 although Ms. Santillo objected to this as a line of redirect,
22 the \$150,000, the \$120,000 payment that happened in 2014 as
23 well as the two \$15,000 payments, all were ultimately funded by
24 Kapcharge. Kapcharge continued to give them tens of thousands
25 of dollars in various so-called donation-type situations that

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1 ultimately went to Mr. Gross and his coconspirators. It is a
2 continuation of the charged conspiracy. It will all be made
3 very clear in the last two days of the government's case that
4 that is, in fact, what's going on.

5 And I think your Honor hits it on the head, which is,
6 it's about obstruction and misstatements to the NCUA that
7 continued into 2015. That is what is charged in the
8 indictment. The indictment doesn't -- she is correct that the
9 indictment focuses in part on the Collectables Club because two
10 of the three defendants were Collectables Club members, but
11 that doesn't mean that it doesn't also cover into 2015, which
12 on its face is after her purported argument of withdrawal,
13 right, because it's after that November meeting when, according
14 to Ms. Santillo, everyone parted ways after a bad business
15 deal. We charged the obstruction into 2015 because Mr. Gross
16 continued to hide the nature of his relationship with
17 Kapcharge. We're entitled to prove that up as part of the
18 relevant charges at trial.

19 THE COURT: Are there in evidence yet alleged
20 misrepresentations after November -- after the meeting that
21 relate to the covering up of the relationship with the
22 Collectables Club?

23 MS. CHOI: Yes. Like the Meg Flok email where Meg
24 Flok asks Trevon Gross who the Collectables Club is, and he
25 gives an answers like they do payroll -- yeah, Kapcharge

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1 processes payroll for them is his statement, which he knows,
2 obviously, is not the case.

3 MS. SANTILLO: There's a very simple explanation for
4 that.

5 THE COURT: And, by all means, you get to make it.
6 That doesn't mean it's not covered in the indictment, and it
7 doesn't mean it's not in evidence in the trial.

8 MS. SANTILLO: But that is not the reason that I'm
9 making the argument, because to the extent that they're
10 alleging that the conspiracy to cover up anything that happened
11 with the Collectables Club spanned into 2015, I think that,
12 depending on how it came out, might squarely go within the
13 scope of the indictment. We're not talking about that. We're
14 talking about 2015. It's misstatements made to the NCUA with
15 respect to the relationship with Kapcharge that is entirely
16 unrelated to the conduct that is charged in the indictment. If
17 you look at the indictment itself, in 2015, the only overt act
18 they've alleged is the Collectables Club sending a letter to
19 the NCUA trying to get back on the board, and that's after the
20 withdrawal.

21 So, it's very clear in the indictment, as Mr. Creizman
22 spelled out in his letter motion last night and as the point we
23 tried to make in our limiting instruction motion was, is that
24 they've charged a conspiratorial agreement between Anthony
25 Murgio, Yuri Lebedev, Trevon Gross with respect to seeking to

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1 get control of the board at HOPE FCU to further an unlawful
2 Bitcoin exchange. That is the charged conspiracy. We are so
3 far afield from that at this point with insider loans, you
4 know, improper bookkeeping on the books of the HOPE FCU, it's a
5 distraction, it's cumulative, it's suggesting conviction on the
6 grounds of some technical violation of a regulation that is so
7 far away from the charged conspiracy.

8 THE COURT: That argument does hinge, though, on the
9 withdrawal point, right?

10 MS. SANTILLO: Well, it's hard for me --

11 THE COURT: I think that's a simple question.

12 MS. SANTILLO: Well, it hinges on withdrawal, but it
13 also hinges on -- because the Collectables Club wasn't even
14 involved with Kapcharge in 2015.

15 THE COURT: I'm going to read the papers, and I am
16 going to read the new papers, but I started by saying isn't
17 there evidence after November 2014 -- is there evidence in the
18 record, but you said there's an easy response to it. But isn't
19 there evidence in the record of misrepresentations by Mr. Gross
20 after November 2014 that goes to covering up misrepresentations
21 vis-a-vis Collectables Club? And you said there's an easy
22 answer to that, but, and then you went to your Kapcharge point.
23 But they come together.

24 MS. SANTILLO: I don't think they come together
25 because I think, to the extent that there are allegations that

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1 there is evidence that suggests a coverup of what happened in
2 2014, that might fairly be within the scope of the conspiracy.
3 But what I am trying to say is that the relationship between
4 Kapcharge and Pastor Gross after that had nothing to do with
5 the charged conspiracy.

6 THE COURT: Right. But there's not withdrawal if
7 there's continued attempts to cover up the conspiracy, right?
8 Isn't that the law?

9 MS. CHOI: Yes.

10 THE COURT: Would you disagree with that as a legal
11 framework?

12 MS. SANTILLO: I don't disagree with that as a legal
13 framework, but I disagree with the notion that there can't
14 be -- that if you meet somebody in a conspiracy, that
15 everything you do with that person from that point forward is
16 still the conspiracy. Like if I met Mr. Creizman, and we
17 agreed to do something illegal, then we went out to have a
18 piece of pizza, what we did over there is not illegal. Every
19 relationship that you enter into with somebody who was once a
20 coconspirator is not in furtherance of the conspiracy. There
21 is a specific charged conspiracy, and the conduct that Pastor
22 Gross and Kapcharge were in had nothing to do with any of the
23 common goals of the conspiracy that has been alleged. They
24 didn't do it with any of those coconspirators, they did it in
25 furtherance of a lawful purpose, which is ACH processing.

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1 So, to the extent that -- even if during that time
2 frame, the two were working to cover up something they had done
3 before, it doesn't mean that everything they did is that same
4 conspiracy that was charged in the indictment. It's a
5 different fact pattern. It's a different, like, purpose that
6 they were trying to achieve, and it's not an unlawful purpose,
7 and it's certainly not the charged unlawful purpose.

8 MS. CHOI: We'll brief it, your Honor. I don't think
9 it makes much sense to continue down this path right now.

10 THE COURT: Okay.

11 MS. CHOI: So one other matter to take up, which is a
12 special verdict form?

13 THE COURT: Oh, yes, yes.

14 MS. CHOI: I guess that's fine.

15 THE COURT: I'll just start by saying, why do we need
16 a special verdict form?

17 MS. CHOI: Or not even special verdict form, I just
18 meant verdict form.

19 THE COURT: Yes. Well, we need a verdict form,
20 although I'm ready to grant Mr. Creizman's unobjected to Rule
21 29. Again, joking.

22 But, in that case, we wouldn't need a verdict form,
23 but we do need a verdict form, and the government suggests
24 needing interrogatories on the objects, right?

25 MS. CHOI: Yes, to just ensure unanimity as to which

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1 objects, but -- hold on one second.

2 THE COURT: Isn't that captured in the instruction?

3 MS. CHOI: It is.

4 MR. NOBLE: It is, Judge, but I think when it comes
5 time for sentencing, it would be very helpful to know which
6 objects the jury found the conspiracy comprised. If anything,
7 I would think it would be the defendants who would want a
8 special verdict on the conspiracy because, otherwise we're
9 going to assume that the jury was unanimous as to all objects
10 of the conspiracy, which is fine, I guess, from the
11 government's perspective, but this is oftentimes an issue on
12 appeal. So if the defendants don't object to a blanket
13 conspiracy verdict form that says guilty or not guilty as to
14 each defendant, yes, your Honor is right, the instructions, I
15 think, that your Honor will give on conspiracy are sufficient
16 because it makes clear that the jurors have to be unanimous as
17 to at least one of the objects of the charged conspiracy, but
18 then it's going to be a bit of a black box.

19 THE COURT: This all came in last night in the swirl
20 of things, but I had understood the request for the special
21 verdict form to be from the government and the specific request
22 from the defendants to be a general verdict form, looking at
23 them, is that correct?

24 MR. CREIZMAN: Yes. I think so, yes.

25 MS. SANTILLO: Yes.

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1 THE COURT: There can be good reasons -- I'm trying to
2 think through what will guide the jury the most and provide the
3 information that is necessary. I think those are the relevant
4 questions.

5 MS. SANTILLO: Your Honor, with respect to our request
6 for not a special verdict form --

7 THE COURT: Yes.

8 MS. SANTILLO: -- it all ties back to this issue we've
9 been talking about because I feel like if you just have
10 conspiracy, and then you have the objects without the defined
11 conspiracy, it's inviting the jury to return a verdict against
12 Mr. Gross for these issues with respect to the Kapcharge
13 disclosures and not with respect to the charged conspiracy.
14 That's all part of my calculus. I understand that there are
15 benefits to a special verdict form if it's properly drafted,
16 but in this case, I just don't think it gives enough protection
17 to him to hold the government to what they charge in the
18 indictment.

19 THE COURT: So the defense -- counsel for both
20 defendants just requested a general verdict form.

21 MR. NOBLE: That's fine for the government then.

22 The only thing we would object to, Judge, is
23 Ms. Santillo's suggestion that there should be additional
24 language defining the conspiracy.

25 THE COURT: Well, I don't want to reinsert a

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1 portion --

2 MR. NOBLE: Right.

3 THE COURT: I've just gone through the whole exercise
4 of reading the charge, and I can't see why we wouldn't just
5 ask -- just rephrase this, so Count Three is what,
6 conspiracy -- conspiracy.

7 MS. CHOI: Yes.

8 MR. NOBLE: We also wouldn't even list all the
9 objects, as Mr. Creizman does, because they will be instructed
10 on that in the jury instructions, and they'll have those with
11 them during their deliberations.

12 To the extent the Court is inclined to list all the
13 different objects, we believe the 1001 objects should all be
14 listed together because that's how it's charged in the
15 indictment, and that's what's correct under the law.

16 MR. CREIZMAN: I have no problem with that. I have no
17 problem with shortening that. I think that with respect to
18 Counts Four, five, six, seven, eight, it describes what the
19 crime is, even conspiracy to commit wire fraud and bank fraud.
20 So I would rather -- at least it's a conspiracy with whatever
21 objects, and I don't mind reducing it to false statements. I
22 don't need like six of them.

23 THE COURT: But it sounds like Ms. Santillo, on behalf
24 of Mr. Gross, does object to inclusion of the objects; is that
25 right?

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1 MS. SANTILLO: I think, as Mr. Shin has pointed out, a
2 lot of these things are interwoven. I've requested summary of
3 the indictment to have the conspiracy defined, and to the
4 extent it's adequate to sort of lay out what I think the
5 indictment -- basically what I think the government needs to
6 prove with respect to the actual charged conspiracy, then we
7 may have less concerns about having the shorthand objects, as
8 long as it's clear that there are bounds.

9 THE COURT: Does anybody have a proposal?

10 MS. CHOI: I'm not sure what -- I think we should just
11 propose conspiracy with a very short explanation of, like, the
12 objects, just to make clear that it's not the conspiracy to do
13 bank or wire fraud. And I think that will solve these
14 problems.

15 THE COURT: All right. Why don't you see if you can
16 come to agreement on that and submit it or make a suggestion
17 now.

18 The other option -- frankly, there's always this
19 problem where you try to put some information in the verdict
20 form. We've just given them the instruction. The instructions
21 are the instructions. We could say Count Three, Count Four,
22 Count Five, Count Six, right?

23 MS. CHOI: Right. That's fine. As long as --

24 MR. NOBLE: Because they will also have the
25 indictment, they will have heard all the instructions, it can

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1 just be Count three, guilty or not guilty as to both
2 defendants.

3 MR. CREIZMAN: And you can reference the jury
4 instructions, if you want to, or whatever.

5 THE COURT: You mean you could say -- well --

6 MS. CHOI: They'll know that. They'll know that.
7 Look, if they don't know what Count Three is, and I am hoping
8 it will be Count One once we redo this, but if it's Count
9 Three, and they don't know what it is, I'm assuming after the
10 charge, they'll know where to look.

11 THE COURT: Does anyone object to just a general
12 verdict form that says Count Three, Yuri Lebedev, guilty, not
13 guilty, Trevon Gross, guilty, not guilty; Count Four, Yuri
14 Lebedev, guilty, not guilty; Count Five, Trevon Gross, guilty,
15 not guilty; Count Six, Yuri Lebedev, guilty, not guilty; Count
16 Seven, Yuri Lebedev, guilty, not guilty; Count Eight, Yuri
17 Lebedev, guilty, not guilty?

18 MR. NOBLE: No objection.

19 MR. CREIZMAN: I have no objection. It just seems my
20 client's name is mentioned more, and that's prejudicial, I
21 believe, but other than that...

22 MS. SANTILLO: No objection.

23 THE COURT: You're flying under the radar strategy is
24 no longer working.

25 I'll prep a verdict form that does just that. We'll

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1 send it to you. Think about it, but let me know by end of the
2 day Sunday if you have any concerns, having reflected on it
3 once you see it. Okay?

4 Obviously, if you do come to an agreement on a
5 renumbering of the charges in light of the --

6 MS. CHOI: We'll fix it all.

7 THE COURT: -- redacted indictment, you'll submit a
8 new version.

9 MS. CHOI: Yes, your Honor.

10 THE COURT: Have we addressed everything other than
11 what we've decided we can't address yet?

12 MS. CHOI: Just one other issue. This is just with
13 regards to me. I'm feeling quite ill, I'm trying to go see the
14 doctor. If I am, for some reason, not there on Monday or have
15 to leave in the middle, I hope your Honor would understand that
16 that's for my own health, and the government will move on and
17 continue to do what it's been doing.

18 THE COURT: All right. Mr. Noble will have to start
19 yelling at me, I guess.

20 MS. CHOI: I don't think I yelled at you today, your
21 Honor.

22 THE COURT: No, it may be true.

23 Well, I hope you feel better, and you do what you need
24 to do. We'll proceed here.

25 MS. CHOI: Thank you, your Honor.

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1 MR. NOBLE: Judge, I hate to beat my hobby horse even
2 more, but the NCUA law and regs, we'd requested that a copy of
3 those be sent back with the jury with the jury instructions,
4 but I'm not sure if we ever decided that.

5 THE COURT: I don't think we did.

6 Mr. Creizman?

7 MR. CREIZMAN: I'm inclined to object, but I'm not
8 sure just because I think there's got to be a reason they want
9 to do that. But, no, seriously, I don't know. I haven't
10 thought about it. I guess I don't --

11 THE COURT: How about this: I haven't thought about
12 it either. I think on your to-do lists -- included on your
13 to-do list is to confer on the specific charge, as we've
14 discussed it, that will be included in the jury instruction on
15 this in light of what I gave and in light of what we discussed
16 today, the alteration to include not only what I instructed
17 them, but testimony that they heard. Why don't, in the process
18 of coming to rest on that, if you indicate what specific
19 provisions you're asking to go back, and then you'll let me
20 know if there is consent or objection.

21 I haven't thought about it.

22 MR. NOBLE: Okay. We'll confer.

23 MS. SANTILLO: Last thing: I understood -- maybe I'm
24 wrong -- that we would get disclosures on what this IRS witness
25 will say. I will just say I've never heard any theory about

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1 wrongdoing with the IRS, this is all new, and I may make an
2 application with respect to their argument. Hopefully, I'll
3 have sufficient time to present it, but I don't know who this
4 witness is, whether it's an expert in tax law, you know, why
5 this hasn't been noticed before, and why we're injecting it
6 into the case at the last minute.

7 MR. NOBLE: Judge, when we got the tax returns and
8 produced them to defense counsel --

9 THE COURT: Which was when?

10 MR. NOBLE: Well before trial. We had a conversation
11 with Ms. Santillo when we explained the relevance of the tax
12 returns, which is what I explained before, that to the extent
13 Mr. Gross didn't report as personal income some of the proceeds
14 he received from these bribe payments, then that shows an
15 intent to conceal that income from the IRS, which goes to
16 consciousness of guilt, corrupt intent, et cetera.

17 We had told her about these tax returns when we were
18 having discussions with her about basically the subject of
19 Ms. Larkins' testimony, that they were going to claim that all
20 of this was legitimate, and we said that the tax information
21 tends to show that he hid this income from the IRS. So we did
22 proffer the relevance of it.

23 The witness is essentially custodial. She's a
24 testifying witness for the IRS who comes and says, these are
25 the tax returns, these are the relevant materials that were

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1 submitted to the IRS for Mr. Gross for the relevant years, and
2 that's what she will testify to. She may provide definitions
3 as to what is income, what should be reported if there are
4 categories of those income, but she's, by no means, going to be
5 testifying as an expert witness.

6 To the extent defense have objections to that witness
7 testifying, for instance, what is income, which is a pretty
8 basic question, it's a legal matter, and we could come to an
9 agreement on the Court instructing the jury as to what
10 constitutes income. But we haven't met with this witness yet
11 to fully debrief her. She's also flying in this weekend, and
12 we're meeting with her on Sunday. We'll turn over the 3500
13 material, but they have had the underlying tax documents for
14 quite some time, and I'm being told we produced the IRS records
15 on January 16th.

16 MS. SANTILLO: Your Honor, I took an entire class in
17 law school on income tax, and it's not a simple issue. It's
18 especially not a simple issue in terms of there's a lot of
19 layers to it. Did he have an accountant? Did he get advice?
20 How was -- where did he get his understanding about what income
21 is? To me, this is classic expert testimony. How is she going
22 to be defining what he should have been reporting in his income
23 taxes if she's not an accountant who has a full knowledge of
24 his not-for-profit churches and how their books and records
25 should be kept? It seems highly irregular to have somebody

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1 come on and purport to say what he should be reporting as
2 income on his taxes.

3 MR. NOBLE: Well, the evidence will speak for itself.
4 We can show he reported --

5 THE COURT: This is an IRS custodial witness?

6 MS. CHOI: Essentially.

7 MR. NOBLE: A court testifying witness is what the IRS
8 calls them, and they have certain things that they're allowed
9 to testify to and that they're not allowed to testify to. And
10 they can get in the IRS documents, they can testify as to what
11 was reported. But I think it's fair game for us to put in
12 other evidence and argue that this is -- to the extent defense
13 counsel is going to try to use Ms. Larkins' or other evidence
14 to argue that these bribe payments, to the extent it went to
15 Mr. Gross, it was constituted backpay or back pastoral support,
16 that's clearly an admission that that is income to him and,
17 it's clear from the other evidence from the IRS records that he
18 did not report that as income.

19 THE COURT: It sounds to me like this witness can
20 testify as to the existence of the documents --

21 MR. NOBLE: And what was reported?

22 THE COURT: -- what was reported. What should be
23 reported? No. No, I don't think so.

24 MR. NOBLE: We're not going to ask her should this
25 income -- like show her the documents -- yes, it's basically

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1 the question of if somebody receives a personal benefit that
2 goes to them that's a financial benefit, is that something that
3 would have to be reported, whether it's a legal payment or an
4 illegal payment, is that something that has to be reported to
5 the IRS? And the answer is an easy, yes, it should be reported
6 to the IRS as gross income.

7 To the extent they have an objection to this witness
8 testifying as to that basic principle, which is all I think we
9 need --

10 THE COURT: What is the basic principle?

11 MR. NOBLE: What constitutes personal income, what
12 falls into the category -- and there's a legal definition, what
13 falls into the category of what should be reported as gross
14 income on the 1040. To the extent she testifies to that, I
15 don't think that's anything that's controversial. But if they
16 have an objection --

17 THE COURT: Is that legal definition part of the tax
18 instruction forms?

19 MR. NOBLE: It quite possibly could be. That's --

20 THE COURT: Where would she be drawing her knowledge
21 as to what should be -- I'm just getting your language.

22 MR. NOBLE: As to what constitutes income?

23 THE COURT: Yes.

24 MR. NOBLE: She works for the IRS. She can testify as
25 to what income is and what has to be reported as gross income

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1 or does not have to be reported as gross income.

2 It's a legal definition, if that's the concern, that
3 she's testifying as to like a point of law, then we would
4 request what we did with respect to the NCUA and just have the
5 Court instruct the jury as to what the definition of income is.

6 THE COURT: You didn't notice her, I gather, as
7 someone who would testify not based on personal knowledge, but
8 based on her expertise working for the IRS as to what, as a
9 legal matter, constitutes income for purposes of tax filings,
10 right?

11 MR. NOBLE: We did not notify her as an expert
12 witness. She's not going to be opining that Mr. Gross should
13 have reported X, Y, and Z as personal income. All she's going
14 to be testifying to is these are the documents, here's what he
15 reported, and this is what the definition of income is.

16 THE COURT: So, that all sounds fine, and I think just
17 here's what the definition of income is, depending on what
18 that's drawn from. If she's pointing basically to a provision
19 in the filing instructions or the like, that seems fine. If
20 it's derived from accounting experience, or what has been
21 adjudicated as appropriately included in income and the like or
22 that sort of thing, then it seems to me it crosses over into
23 something I wouldn't allow.

24 Ms. Santillo.

25 MS. SANTILLO: I also just have very big concerns

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1 about this turning into a tax case. You know, it was an ACH
2 processing case and violating regulations, and now it's a tax
3 case?

4 (Continued on next page)

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1 THE COURT: It's not a tax case, at least as I
2 understand it, and you've indicated the relevance of
3 Ms. Larkins. You've already indicated the relevance, unless I
4 misunderstood.

5 MS. SANTILLO: That's true. But in terms of defending
6 a tax case --

7 THE COURT: It's not a tax case. She hasn't been
8 charged with tax violations of the tax laws, but it is often
9 the case that tax returns, I think in probably every financial
10 case I've seen tried, tax returns are often used as a form of
11 evidence of guilt and of guilty consciousness to the extent
12 that -- and corrupt intent to the extent that reporting is
13 inconsistent with income and the like. If you have money in
14 and it's not reported on your tax forms, there's many
15 legitimate inferences that can be drawn. You, yourselves, have
16 acknowledged the relevance of a distinction between personal
17 expenses and business expenses in a sense, so it's hard for me
18 to see how this isn't relevant.

19 MS. SANTILLO: I think your point is well taken. I
20 think the problem is, when a witness who is testifying about
21 just what's on the tax return and the definition of income, it
22 is much more complicated than that with a non-profit
23 organization, and with these issues with respect to, you know,
24 look, if something isn't booked properly, are we going to have
25 a tangential sideshow about -- the question is whether he had a

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1 corrupt intent, and it's not about whether -- I'm just afraid
2 that they're going create this inference that there's one
3 straight definition for income that has to be met, when clearly
4 there's a whole industry around figuring out what income is.
5 And particularly with respect to --

6 THE COURT: But I guess I'm wondering if it's in light
7 of my ruling. So I'm going to let -- the custodial witness
8 from the IRS can say, "These are the tax forms. These were
9 submitted to the IRS. Here's what he filled out for income."
10 And then what remains a question, but to the extent they want
11 to say what's the IRS instructional definition of income, and
12 she can just read whatever that is. Do you have an objection
13 to that? I just can't -- I'm not making a judgment, I'm
14 genuinely asking if your objection is to that or something
15 else.

16 MS. SANTILLO: I don't know because having not seen
17 how she would testify about it, if it's derivative -- if
18 there's certain layers of, you know, you get income from, you
19 know, certain streams of income, and you have to make an
20 offsetting calculation, I just don't know how complex the
21 definition is and whether it has subjectivity embedded within
22 it such that it won't be fair to make an inference that he was
23 intentionally excluding something.

24 THE COURT: I won't allow any embedded -- it might be
25 that there's ambiguity in the definition, but I'm allowing this

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1 witness to testify, if there is a readily available
2 definition -- and it's almost to the middle of April so I
3 should have this firmly in mind -- but if there is a readily
4 available definition that she can simply read from the relevant
5 tax form, I'm not going to let questioning go beyond that.

6 MS. SANTILLO: Thank you, your Honor.

7 THE COURT: Thank you. Anything else? I have
8 something scratching the back of my head that I haven't
9 addressed, but I don't know what it is so we'll call it a day.

10 I'm not repeating, I'm not going back over what it is
11 that I've asked you to do, but you'll do it.

12 MR. NOBLE: Yes.

13 THE COURT: And pull the transcript if you need to
14 confirm what it is that I've asked you to do. But to the
15 extent -- especially with respect to the charge, there are
16 outstanding items. As soon as you get those to me, we'll
17 incorporate them into the red lined version, and then what I'd
18 like to do is to just send out the red lined version for
19 everybody to confirm that we've incorporated everything that
20 I've either ruled on or that you've agreed to today so at least
21 it can stand still with respect to that, and then we can save
22 what's left for the outstanding issues.

23 I think that's it. I'll await your filings and I'll
24 see everybody 9:00 a.m. on Monday. Thank you.

25 (Adjourned to March 6, 2017 at 9:00 a.m.)